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Supreme Court of the United States

OCTOBER TERM, 1967

No. 722

CAPTAIN DALE E. NOYD, FR28084,

Petitioner,

—v.—

HONORABLE ROBERT S. MCNAMARA, Secretary of Defense; HONORABLE HAROLD W. BROWN, Secretary of the Air Force; GENERAL JOHN P. MCCONNELL, Chief of Staff, United States Air Force; LIEUTENANT GENERAL THOMAS S. MOORMAN, Superintendent, United States Air Force Academy; MAJOR GENERAL G. B. GREENE, JR., Assistant Deputy Chief of Staff/Personnel for Military Personnel, United States Air Force; LIEUTENANT GENERAL LEWIS B. HERSHEY, National Director, Selective Service System; COLONEL JOHN E. HORNE, Deputy Chief of Staff, Personnel, United States Air Force Academy; COLONEL HENRY E. WOJDYLA, Head, Department of Psychology and Leadership, United States Air Force Academy; BRIGADIER GENERAL ROBERT MCDERMOTT, Dean of Faculty, United States Air Force Academy,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Statement of Questions Presented	3
Questions Presented for Review	4
Constitutional and Statutory Provisions and Air Force Regulations Involved	5
Statement of the Case	7
Reasons for Granting the Writ:	
I	20
II	27
III	35
IV	39
CONCLUSION	42
APPENDIX:	
Opinion of the District Court, District of Colorado, dated March 29, 1967	1a
Opinion of the District Court, District of Colorado, dated April 25, 1967	4a
Opinion of the Court of Appeals for the Tenth Circuit	19a
Air Force Regulation, No. 35-24	23a

Table of Authorities

PAGE

Cases:

Application of Stapely, 246 F. Supp. 316 (D. Utah 1965) 37
Arndt v. U. S., 222 F. 2d 484 (5th Cir. 1955) 38
Ashe v. McNamara, 355 F. 2d 277 (1st Cir. 1965) 20, 21

Baggett v. Bullitt, 377 U. S. 360 (1964) 23
Barbier v. Connolly, 113 U. S. 27 (1885) 26
Barry v. O'Connell, 308 N. Y. 46, 100 N. E. 2d 127 (1951) 40
Beard v. Stahr, 370 U. S. 41 (1962) 37
Bland v. Connally, 293 F. 2d 852 (D. C. Cir. 1961) 37
Bolling v. Sharpe, 347 U. S. 497 (1954) 25, 34
Bouziden v. U. S., 251 F. 2d 728 (10th Cir. 1958) 32
Brackett v. Bd. of Appeal of Building Dept., 311 Mass. 52, 39 N. E. 2d 956 (1942) 40
Brewer v. U. S., 211 F. 2d 864 (4th Cir. 1954) 38
Brown v. McNamara, 263 F. Supp. 686 (D. N. J. 1967) 20, 36
Burns v. Wilson, 346 U. S. 137 (1953) 20, 21, 25, 37

Cantwell v. Connecticut, 310 U. S. 296 (1940) 23
Carmichael v. Allen, 267 F. Supp. 985 (N. D. Ga. 1967) 24
Christensen v. Hedrick, unreported, Civil No. 45613, U. S. D. C., N. D. Calif. 27
Clackum v. U. S., 296 F. 2d 226 (Ct. Cl. 1960) 36-37
Coe v. Armour Fertilizer Works, 237 U. S. 413 (1915) 36

Dombrowski v. Pfister, 380 U. S. 479 (1965) 23, 24, 25

Gallagher v. Quinn, 363 F. 2d 301 (D. C. Cir. 1966) 20
Galvan v. Press, 347 U. S. 522 (1954) 36-37

PAGE

Gibbs v. Blackwell, 354 F. 2d 469 (5th Cir. 1965) 21
Gibson v. U. S., 329 U. S. 338 (1946) 25-26
Gilliam v. Reaves, 263 F. Supp. 378 (W. D. La. 1966) 20, 27
Gonzales v. U. S., 348 U. S. 407 (1955) 38
Greene v. McElroy, 360 U. S. 474 (1959) 36, 37
Gusik v. Schilder, 340 U. S. 128 (1950) 22, 25

Harmon v. Brucker, 355 U. S. 579 (1958) 20, 37

Ingalls v. Zuckert, 309 F. 2d 659 (D. C. Cir. 1962) 41

Joint Anti-Fascist Committee v. McGrath, 341 U. S. 123 (1951) 36, 37

Keyishian v. Bd. of Regents, 385 U. S. 589 (1967) 23
Kretchet v. U. S., 284 F. 2d 561 (9th Cir. 1960) 32, 33

Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61 (1911) 26
Londoner v. Denver, 210 U. S. 373 (1908) 36
Ludecke v. Watkins, 335 U. S. 160 (1948) 37

Mayfield v. U. S., 220 F. 2d 729 (5th Cir. 1955) 32
Morgan v. U. S., 304 U. S. 1 (1938) 36

N. A. A. C. P. v. Button, 371 U. S. 415 (1963) 23
Noyd v. McNamara, —— F. Supp. ——, 267 F. Supp. 701 (D. Colo. 1967), 378 F. 2d 538 (10th Cir. 1967) ..... *passim*

Orloff v. Willoughby, 345 U. S. 83 (1953) 20, 21
Overseas Media Corporation v. McNamara, #20,590 (D. C. 1967) 37

PAGE

Palomera v. Taylor, 344 F. 2d 937 (10th Cir. 1965) 20, 21
Pekarski v. U. S., 207 F. 2d 930 (2nd Cir. 1953) 32

Reed Enterprises v. Corcoran, 354 F. 2d 519 (D. C. Cir. 1965) 24
Reed v. Franke, 297 F. 2d 17 (4th Cir. 1961) 20, 37
Reid v. Covert, 354 U. S. 1 (1957) 24

Service v. Dulles, 354 U. S. 363 (1957) 41
Shapiro v. U. S., 69 F. Supp. 205 (Ct. Cl. 1947) 37
Shaw v. U. S., 357 F. 2d 949 (Ct. Cl. 1966) 21
Shepherd v. U. S., 217 F. 2d 942 (9th Cir. 1954) 32, 33
Sherbert v. Verner, 374 U. S. 398 (1963) 23, 34
Sicurella v. U. S., 348 U. S. 385 (1955) 32, 34
Simmons v. U. S., 348 U. S. 397 (1955) 38
Smith v. U. S., 155 Ct. Cl. 682 (1961) 41
Speiser v. Randall, 357 U. S. 513 (1958) 23
Stamler v. Willis, 371 F. 2d 413 (7th Cir. 1966) 24

Taffs v. U. S., 208 F. 2d 329 (8th Cir. 1953), cert. denied 347 U. S. 928 (1954) 29
Torcaso v. Watkins, 367 U. S. 488 (1961) 34
Toth v. Quarles, 350 U. S. 11 (1955) 24

U. S. v. Brown, tried in Ft. Dix, N. J. on September 18, 1967 21-22
U. S. v. Gearey, 368 F. 2d 144 (2nd Cir. 1966) 26, 38
U. S. v. Jacoby, 11 U. S. C. M. A. 428, 29 C. M. R. 244 (1960) 37
U. S. v. Kauten, 133 F. 2d 703 (2nd Cir. 1943) 30, 31, 32
U. S. v. Kurki, 255 F. Supp. 161 (E. D. Wisc. 1966) 32
U. S. v. Macintosh, 283 U. S. 605 (1935) 34

PAGE

United States v. Mason, #4207, U. S. D. C., D. Mont. decided on September 15, 1967 41
U. S. v. Seeger, 380 U. S. 163 (1965) 34
U. S. ex rel. Accardi v. Shaughnessy, 349 U. S. 286 (1954) 41
U. S. ex rel. Knauff v. Shaughnessy, 338 U. S. 537 (1950) 37

Vitarelli v. Seaton, 359 U. S. 535 (1959) 41

Watkins v. Rupert, 224 F. 2d 47 (2nd Cir. 1955) 26
West Virginia State Bd. of Education v. Barnette, 319 U. S. 624 (1943) 23
Williams v. Zuckert, 372 U. S. 765 (1963) 37
Wolff v. Selective Service System Local Bd. No. 66, 372 F. 2d 817 (2nd Cir. 1967) 24

United States Constitution:

First Amendment 5, 23, 34
Fifth Amendment 5, 25, 34, 35, 36

Statutes:

28 U. S. C. §1254(1) 2
28 U. S. C. §1651(a) 16
28 U. S. C. §2241 20
50 U. S. C. §456(j), Section 6(j) of the Universal Military Training and Service Act of 1950, as amended ..... *passim*
54 Stat. §885, Selective Training and Service Act of 1940 29

PAGE

Regulations:

Air Force Regulations:
AFR 35-24 ..... *passim*
AFR 36-12 8

Selective Service Regulations:
1622.11 29
1622.14 29

Other Authorities:

Hart & Wechsler, *The Federal Courts and the Federal System* 1238-39 (1953) 21

Hershey et al., *Legal Aspects of Selective Service*, U. S. Government Printing Office (1963 Revision), p. 11 ..... 28, 31

Pfeffer, *The Liberties of an American*, 1956, at p. 31 .. 33

Quinn, "The United States Court of Military Appeals and Military Due Process," 35 St. John's L. Rev. 225, 232 (1961) 37

Report of the President's National Advisory Committee on Selective Service 11 (1967) 26

Tillich, *The Courage to Be* 14

Warren, "The Bill of Rights and the Military," 37 N. Y. U. L. Rev. 181, 197 (1962) 37

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on May 16, 1967.

Citations to Opinions Below

The March 29, 1967 opinion of the United States District Court for the District of Colorado, Hon. William E. Doyle, U. S. D. J., granting, in part, petitioner's motion for a preliminary injunction, is reported at —— F. Supp. ——, and is printed in the Appendix, *infra*, p. 1a. The April 25, 1967 opinion of the District Court, per Judge Doyle, after trial, dismissing the complaint on jurisdictional grounds, is reported at 267 F. Supp. 701, and is printed in the Appendix, *infra*, p. 4a. The Per Curiam opinion of the Court of Appeals for the Tenth Circuit, affirming the District Court, is reported at 378 F. 2d 538 (1967), and is printed in the Appendix, *infra*, p. 19a.*

Jurisdiction

The judgment of the Court of Appeals was entered on May 16, 1967. On August 10, 1967, Mr. Justice Fortas issued an order extending the time in which to file this petition for a writ of certiorari up to and including September 13, 1967, and on September 13, 1967, Mr. Justice Fortas further extended such time up to and including October 13, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

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* References to material printed in the Appendix will hereinafter appear as "App. —— ".

Statement of Questions Presented

1. Petitioner is an Air Force officer who became a conscientious objector after eleven years of honorable service, and whose application for recognition as a conscientious objector and either discharge or reassignment to duties not conflicting with his conscience, was denied by his military superiors. Must petitioner commit a crime and submit to a military court martial before gaining Federal Court review of his constitutional claims?

(a) Whether the courts below properly held that they were without jurisdiction on the grounds that petitioner had not exhausted his administrative remedies.

(b) Whether such a rule of exhaustion violates the principle expressed by this Court in *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965) and other cases which condemn unfounded procedural obstacles to the exercise of constitutional rights under the First Amendment.

(c) Whether the holdings of the courts below that an in-service conscientious objector claimant is not entitled to the same judicial review on habeas corpus as a Selective Service registrant whose conscientious objector claim has been denied, is a violation of the equal protection guarantee of the Fifth Amendment.

2. Whether petitioner's application for conscientious objector status, based upon religiously motivated objection to a particular unjust war, was within the standards and criteria of AFR 35-24, and its statutory basis, Section 6(j) of the Universal Military Training and Service Act, 50 App. U. S. C. §456(j).

(a) Whether the position taken by the Secretary of the Air Force, that conscientious objector status is barred to any claimant who is not a universal pacifist is a correct reading of the applicable statute, regulations and decisional law.

(b) Whether a denial of petitioner's claim on the grounds that his religious beliefs compel opposition to participation in unjust wars but not to all wars is a violation of the religious liberty clause of the First Amendment and the due process clause of the Fifth Amendment.

3. Whether the procedures established by the applicable Air Force Regulation, AFR 35-24, for the processing, evaluation and determination of applications for conscientious objector status are so lacking in the minimum requirements of procedural due process that petitioner was deprived of his constitutional rights under the Fifth Amendment.

4. Whether the denial of petitioner's application was unlawful and void because of the failure by the Air Force to adhere to the requirements of its own regulations governing the processing of such application.

Constitutional and Statutory Provisions and Air Force Regulations Involved

This case involves the due process clause of the Fifth Amendment and the religious liberty and establishment of religion clauses of the First Amendment.

The statute most closely involved is that which expresses national policy on conscientious objection to participation in military service, Section 6(j) of the Universal Military Training and Service Act of 1950, as amended, 50 App. U. S. C. §456(j). At all times pertinent* to this case, it read as follows:

> "(j) Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title [said sections], be assigned to noncombatant service as defined by the

* Certain amendments to §6(j) effected by the Military Selective Service Act of 1967, are not applicable to this case.

President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. . . . Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title [said sections], he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) [section 454(b) of this Appendix] such civilian work contributing to the maintenance of the national health, safety, or interest as the

local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title [section 462 of this Appendix], to have knowingly failed or neglected to perform a duty required of him under this title [sections 451-454 and 455-471 of this Appendix]. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

Many provisions of Air Force Regulations are involved. The principal regulation is AFR 35-24, entitled "Disposition of Conscientious Objectors". It is set forth in full in the Appendix, App. 23a.

Statement of the Case

Petitioner is an Air Force Captain who became "a conscientious objector to wars of aggression, particularly to the Vietnam conflict," 378 F. 2d at 538, App. 20a after 11 years of honorable service, while he was assigned as Assistant Professor of Psychology at the Air Force Academy. Petitioner's conscientious beliefs were set forth in detail in the complaint, and exhibits A to K attached

thereto (R. 29-76),* all of which were received in evidence and were the subject of considerable testimony in the proceedings below. They were perhaps best summarized by District Judge Doyle in his opinion of March 29, 1967, as follows:

> "... he holds a philosophy which he declares as 'ethical humanism' which dictates these scruples against war ... he does not object to all war ... he objects rather to particular wars of aggression, but specifically to the Vietnam War and that he would not be a conscientious objector if it were a matter of defending the United States. He doesn't rule out the possibility that he would go to foreign countries first in order to carry out an assignment of defending the United States." —— F. Supp. at ——, App. 1a.

Petitioner made application under appropriate regulations for resignation from the Air Force, both in the best interests of the Air Force under Air Force Regulation (hereinafter "AFR") 36-12, and on specific grounds of conscientious objection under AFR 35-24, App. 23a. Both applications, as well as the text of AFR 35-24, were attached as Exhibits A, B and C to the complaint. The applications specified that petitioner sought either acceptance of his resignation, or reassignment to duties not in conflict with his conscientious position. Both applications were denied and petitioner, a former fighter pilot, received orders assigning him to the 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico, for upgrade training in F-100 jet fighter aircraft. "This aircraft is currently being used

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* References to the transcript of the record will appear as "R. ——."

in Vietnam, and the probability is strong that anyone receiving training at Cannon can anticipate transfer to the combat zone." 267 F. Supp. at 705, App. 10a.

Prior to the effective date of such transfer order, April 1, 1967, petitioner and his counsel made various attempts to confer with superior military and civilian Air Force officials for the purpose of obtaining a reassignment which would not be in conflict with his conscience and which would thereby preclude this litigation. All of these futile efforts were set forth in detail in the complaint.

On March 27, 1967 this action was instituted in the United States District Court for the District of Colorado, seeking declaratory judgment, injunctive relief, relief in the nature of habeas corpus, and ancillary relief. In essence, Capt. Noyd's grievance below was threefold:

1. His application for recognition as a conscientious objector, and either separation or appropriate reassignment, was improperly and discriminatorily denied by the Air Force, in violation of his constitutional rights and relevant statutes and regulations.

2. AFR 35-24, which specifies the manner in which applications for conscientious objection are processed, evaluated and adjudicated, is unconstitutional, both on its face and as applied to petitioner, in that it is totally devoid of the minimum standards of procedural due process.

3. The Air Force failed to follow its own promulgated regulations, and violated the specific provisions of AFR 35-24, par. 6a, App. 25a, in that petitioner's commanding officer, the respondent General Moorman, failed to indicate the reasons for recommending disapproval of appellant's application.

On March 27th, simultaneously with the filing of the complaint, a motion was made seeking preliminary injunctive relief; specifically, that respondents should be restrained from executing their anticipated order of assigning petitioner to fly fighter aircraft in Vietnam, or to train therefor, or to other duty in conflict with his conscience, prior to the determination of this action by the Court. The Court heard extensive argument by counsel, and, on March 29th, handed down its opinion, stating in essence:

> "I have determined that a preliminary injunction should issue against assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a General Court Martial or other proceedings which might injure him as a practical matter . . . accordingly, the injunction, or restraining order which is entered is against requiring the plaintiff, until the further order of the Court and until a hearing on the merits can be had, to perform combat-type activity, directly or indirectly." —— F. Supp. at ——, App. 3a.

On March 31, 1967, the Court signed an order incorporating this direction, and further ordering "that this matter is set for hearing on the merits on Wednesday, April 19, 1967."

On April 19, 1967, respondent moved to dismiss for lack of jurisdiction, and for summary judgment, and, specifically, to bar petitioner from introducing any testimony in support of the merits of his case. The Court denied the motion to bar, reserved decision on the substantive motions, and allowed petitioner to proceed with testimony.

Petitioner's first witness was Chaplain Captain Donald B. Clapp, an Episcopal Minister who had formerly been assigned as Protestant Chaplain at the United States Air Force Academy, and who was currently en route to reassignment in Southeast Asia (R. 472). Chaplain Clapp testified that petitioner had approached him for pastoral advice and counseling in connection with his conscientious objector claim; that he had read the various applications, letters and supporting documents; that he had spent many hours in lengthy discussions with petitioner concerning his claim of conscientious objection, its religious basis, and all of the ramifications thereof; and that he regarded petitioner as utterly and unequivocally sincere in his application, and as thoroughly religious in his motivation (R. 478). He testified specifically that there was not the slightest question in his mind but that Capt. Noyd was acting out of deep conscientious conviction, and not out of fear, cowardice, desire to avoid a hazardous assignment, or any other motive (R. 478-479).

Chaplain Clapp testified further that he had discussed Capt. Noyd's conscientious objector claim with both Chaplain Lt. Col. Hofstad, the senior base Protestant Chaplain (R. 480), and with Chaplain Lt. Col. Hesseldence, the base chaplain (R. 487), and that after such discussions his views concerning petitioner were held "even more strongly" (R. 488).

Inasmuch as all of petitioner's applications and supporting documents were accepted in evidence (plaintiff's Exhibits A-K below), petitioner's testimony did not seek to systematically reiterate the presentation of his case. However, he did rebut the innuendo contained in the memorandum submitted and oral argument made by counsel for

the Government, to the effect that he did not submit his applications until after he was advised, in November, 1966, that he had been ordered reassigned to flying duty in June of 1967. Petitioner testified and a document was marked for identification (Ex. P) in support of this testimony, that he had made his decision to seek conscientious objector status in the early fall of 1966, and had consulted American Civil Liberties Union counsel in Denver and New York prior to his being informed of the updating of his "return to cockpit" (R. 561). At the time petitioner made his decision he had no reason to believe that his tour of duty at the Air Force Academy would have ended prior to June of 1968, the completion of a normal five-year faculty assignment. Capt. Noyd also clarified the precise nature of his conscientious objection to participation in the Vietnam War, and stated that he would be available to accept any duty assignment, anywhere in the world, however remote and however hazardous, except for assignments which would directly or indirectly involve his participation in the Vietnam War, in violation of his conscience (R. 578-579).

Three "distinguished theologians and philosophers," 267 F. Supp. at 705, App. 11a, were qualified as expert witnesses and testified on behalf of petitioner. They were:

> *Dr. Paul Kurtz,* Professor of Philosophy at the State University of New York at Buffalo, Chairman of the editorial board of *The Humanist* (the periodical publication of American Humanist Association), author of *Decision and the Condition of Man* (University of Washington Press, 1965), and several other books, and editor of *Humanist Ethics* (a collection of essays by

leading theologians and philosophers being published by Prentice Hall this year).

Dr. Robert C. Kimball, Professor of Theology at the Starr King School for the Ministry at Berkeley, California, Unitarian and Congregational Minister, formerly lecturer at Harvard Divinity School, editor of *Theology of Culture* (Oxford University Press, New York 1959), and Literary Executor of the Estate of Paul Tillich.

Dr. Robert McAfee Brown, Professor of Religion at Stanford University, formerly Professor of Religion at Union Theological Seminary, author of *The Spirit of Protestantism* (Oxford University Press 1961) and (with Gustave Weigal, S.J.) *An American Dialogue* (Doubleday), and other books, member of the editorial boards of *Christianity and Crisis* and *The Journal of Ecumenical Studies,* holder of honorary doctorates from Notre Dame, Boston University, Loyola, University of San Francisco, Amherst and Lewis and Clark University, and official observer for the World Alliance of Reformed and Presbyterian Churches to the Second Vatican Council.

Each expert witness testified, with respect to the facts of this case, from personal familiarity with the petitioner's applications and from personal interviews with Captain Noyd which were arranged for the purpose of the expert being called a witness in this case.

Dr. Kurtz testified that Religious Humanism is rooted in the deepest traditions of the West, in the humanism prevalent in the Christian religion, and in such other major religions as Buddhism and Confucianism (R. 494). Peti-

tioner's applications, he testified, and the background and beliefs expressed in his total position, identify him as a genuine participant in this religious tradition (R. 497).

Dr. Kimball described the meaning of religion, as it is captured in Tillich's dictum that that which is a man's ultimate concern is God for him (R. 508). The evidence that petitioner's conscientious objections are religious, he stated, are to be found both in his sincerity and in his courage, the two being central to the Tillichian concept (*vide*, Tillich, *The Courage to Be*) (R. 512).

Dr. Brown testified that what is or is not religious might properly be tested in terms of the root of the word "religion" (Latin: *religare*, to bind fast) from which it may be defined as "that to which one binds himself" (R. 526). Religion is found, not just in what one says—in rituals and creeds—but in the degree of congruence between expressed statements of belief and what one does with his life. Dr. Brown found a commitment authenticating his words in petitioner's life and deeds which led him to conclude that his position is clearly based on religious training and belief (R. 527, 546).

On the subject of the religious man's participation in war, Dr. Brown identified several separate strains or traditions of religious thought within Western religions (R. 543 et seq.). He pointed out that these traditions sometimes cut across denominational or sectarian lines; for instance, the Jehovah's Witnesses partake of both the "pacifist" and the "crusade" traditions which are, in a sense, the opposite extremes of the total spectrum of views presented by these peace-war traditions (R. 545).

Dr. Brown emphasized the number of modern religious leaders and denominational bodies which had expressed themselves on the import of religious teachings for the religious man's participation in war. He pointed out, for instance, that the most recent pronouncements of Pope Paul VI approach the verge of describing the very war to which petitioner objects in conscience as an unjust war, and he described the commitment of the Catholic Church and of several American Protestant denominations to support the conscience of those who find that they cannot participate in war or in a particular war (R. 536 to 537, 539 to 542).

All three expert witnesses testified that the differences between universal pacifism and discriminating pacifism, religiously, is confined to the content of their religious beliefs. It does not extend to their religious quality. Both are equally religious, in every sense of the word; neither is more "political" than the other. Neither can be said to belong to a more ancient or venerable religious tradition than the other. Dr. Kimball pointed out that both the universal pacifist and the discriminating objector have general principles which each must apply discriminately, in particular circumstances. (The universal pacifist, for instance, must discriminate among various of his individual actions, such as paying taxes, in terms of whether they amount to participation in war. R. 517.) Dr. Brown stated that, if the law were to exempt universal pacifists while denying exemption to discriminating ones, it would discriminate religiously—by *content* of belief—against some religious views and in favor of others (R. 542 to 543).

At the conclusion of the testimony presented on April 19th, plaintiff rested (R. 580). Defendants likewise rested,

expressly declining to offer any testimony (R. 580). The District Court reserved decision. On April 25, 1967 the Court handed down its opinion holding that it did not have jurisdiction, essentially on grounds of non-exhaustion.* With respect to the merits, Judge Doyle wrote:

> "We do not reach the merits of plaintiff's case and hence we do not deny his sincerity or review his particular basis for claiming that he is a conscientious objector." 267 F. Supp. at 708, App. 18a.

The Court's order of April 27, 1967 dismissed the complaint on jurisdictional grounds and dissolved the injunctive order previously issued.

Notice of appeal was timely filed in the Court of Appeals for the Tenth Circuit, and a stay was granted pending appeal, pursuant to the All Writs Statute, 28 U. S. C. §1651(a), over the respondents' objections. Submission of briefs and oral argument were accelerated, and on May 16, 1967 the Court of Appeals affirmed the District Court, 378 F. 2d 538, App. 19a, but continued the stay for a period of ten days to allow time for a stay application pending certiorari to be made to this Court. An application for a stay of the mandate of the Tenth Circuit was timely presented to Mr. Justice White, as Circuit Justice for the Tenth Circuit, and denied on June 2, 1967.

Although not included in the record below, the Court may wish to be informed of subsequent factual developments.

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* This was directly contrary to the Court's March 29th opinion which held "there is probable jurisdiction shown justifying the granting of some kind of relief." —— F. Supp. ——, App. 3a. Exhaustion and other aspects of the jurisdictional question are discussed in Point I, *infra*.

Petitioner has been at Cannon Air Force Base, Clovis, New Mexico, since April 1, 1967, in obedience to the military orders which transferred him there from his previous assignment as Asst. Prof. of Psychology at the Air Force Academy. While he was under the protection of injunctive orders of the District Court and Court of Appeals, he was assigned to various non-combatant duties, including principally that of Base Housing Officer. In a further attempt to exhaust every conceivable Air Force administrative remedy, he submitted, on June 19, 1967, a new application for resignation or reassignment as a conscientious objector, and attached thereto, as further evidence of his religious beliefs, and the sincerity with which he held them, the transcript of the testimony heard in the District Court.

This application received favorable recommendations from the Chaplain who interviewed Capt. Noyd, pursuant to the provisions of AFR 35-24, and also from his commanding officer, Col. William A. Hoy, Jr., Commander of the 832d Combat Support Group at Cannon Air Force Base. Col. Hoy's recommendation reads, in part:

> "Captain Noyd is completely sincere, honest, and forthright in his objections to the Vietnam conflict on religious grounds. His religion is not of the more conventional or universally accepted faiths. He is a humanist and if the expert opinion of many clergymen has validity then it is a religion in the true sense. In my view he completely meets the criteria of a conscientious objector as outlined in AFR 35-24 and the intent of Congress when they provided for conscientious objector status." (1st Ind. to 832d CSG (SVS/BH) Ltr., 19 Jun. 67, dated 23 June 1967, par. 1d.)

While the application was before the Secretary of the Air Force, a special memorandum was prepared by Capt. Noyd's counsel and submitted to the Secretary. The purpose of the memorandum was to trace the development of decisional law on the question of whether or not conscientious objector status must be confined to universal pacifists, and denied to any applicant who is not a conscientious objector to participation in any and all wars. The memorandum contended that the notion of confining conscientious objector status to universal pacifists resulted from a widely held misreading of the decisional law.*

On August 21, 1967, petitioner was notified that his application was denied by the Secretary, and he was ordered reassigned, effective August 22, 1967 to the 524th Tactical Fighter Squadron of the 27th Tactical Fighter Wing for entry into F-100 recurrency training and upgrade training as an instructor pilot. Shortly thereafter, Capt. Noyd entered upon instructor pilot upgrade training, after having again advised his Air Force superiors that while his conscience does not compel him to refuse such training, it will compel him to refuse to put such training to use, either in Vietnam, or in instructing other pilots bound for Vietnam. On August 28, 1967, Capt. Noyd wrote his Commanding Officer, in part:

> "My humanist beliefs demand that I assume *individual responsibility* for my actions and to bring humanist judgment upon the use of military violence—and especially my contribution to that violence. This personal moral responsibility is unmitigated by the commands of my government or the unpopularity of my beliefs."

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* The arguments contained in the memorandum are digested in Point I of this petition, *infra*.

"I am not conscientiously opposed to recurrency training in the F-100 or to all flying assignments in that aircraft. I am convinced, however often I attempt to deny it or rationalize it away, that the training of RTU pilots for Vietnam *is* a direct and significant contribution to the war and as such is the same affront to my conscience as killing Vietnamese. . . . If I were to perform duties as an instructor pilot, I could be almost certain that any skills I imparted to a student pilot would soon be employed in the killing of Vietnamese. Doubly tragic would be the constant awareness that any young man whom I would be training may forfeit his life in a cause that I believe to be immoral and worthless."

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"Your orders have now put me in the position wherein it appears that I shall inevitably be confronted with duties—those of instructor pilot—which would violate my conscience. Again these I would be compelled to refuse. . . . I shall, however, if ordered to begin training, attempt to suppress the resultant feelings of anger and futility and to satisfactorily fulfill the assigned duties. This I shall continue to do, as I have both at the Air Force Academy and Cannon AFB until I am up against the wall with an order which violates my conscience and which I shall be compelled to refuse."

Petitioner's training as an instructor pilot is continuing. As of the presentation of this petition, on October 13, 1967, it is anticipated that such training will be concluded, and petitioner assigned duties as an instructor pilot, within a matter of weeks.

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals decided important questions of federal constitutional law which should be settled by this Court, particularly since its holdings appear to conflict with applicable rulings of this Court and those of several other courts of appeals.

I.

This case presents the important and substantial question whether an in-service applicant for conscientious objector status, who has exhausted all his administrative remedies, must commit a crime and submit to a military court martial before gaining a federal review of his constitutional claims. At the outset it is important to note that neither of the courts below appear to have questioned the jurisdiction of federal courts to *ultimately* determine the underlying substantive questions.[1] Nor is any question

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[1] The District Court held "for the strict requirement of exhaustion as a prerequisite to jurisdiction." 267 F. Supp. at 707, App. 14a. The Court of Appeals held that petitioner "has not exhausted the military process . . . . ", 378 F. 2d at 539, App. 20a-21a. Thus, neither court said no jurisdiction; they merely said not yet. These holdings are consistent with the now well-established principle that civil courts have habeas corpus jurisdiction, 28 U. S. C. 2241 (1964), to review the constitutionality of actions of military authorities. *Burns* v. *Wilson*, 346 U. S. 137, 139 (1953). See also *Harmon* v. *Brucker*, 355 U. S. 579 (1958); *Orloff* v. *Willoughby*, 345 U. S. 83 (1953). The lower federal courts have regularly exercised this power. See, e.g., *Gallagher* v. *Quinn*, 363 F. 2d 301 (D. C. Cir. 1966); *Reed* v. *Franke*, 297 F. 2d 17, 20 (4th Cir. 1961); *Ashe* v. *McNamara*, 355 F. 2d 277 (1st Cir. 1965); *Palomera* v. *Taylor*, 344 F. 2d 937 (10th Cir. 1965). See particularly, *Gilliam* v. *Reaves*, 263 F. Supp. 378, 384 (W. D. La. 1966). But see also *Brown* v. *McNamara*, 263 F. Supp. 686 (D. N. J. 1967), appeal argued in Third Circuit, Oct. 5, 1967.

raised as to the proper *scope* of federal review.[2] The significant and disputed issue is solely that of determining the point at which this jurisdiction is to be exercised.

A. The determination by the District Court, affirmed *per curiam* by the Court of Appeals, that federal adjudication of petitioner's constitutional claims is precluded by the doctrine of exhaustion of administrative remedies, is erroneous. The decisions below severely misconstrue the nature of the exhaustion doctrine, distort its rationale, and are wholly unsupported by the cases cited in the opinions. Indeed, in *Orloff* v. *Willoughby*, 345 U. S. 83 (1953), this Court impliedly refuted the proposition that submission to a court martial is a necessary element of exhaustion. In deciding that case on its merits, the Court rejected the Government's argument, 345 U. S. at 85, that Dr. Orloff must refuse to perform his assigned duties and assert his claims as affirmative defenses before a court martial proceeding.[3]

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[2] While some question exists as to the proper scope of review of *factual* determinations of military bodies, compare *Ashe* v. *McNamara*, *supra* at 280, with *Palomera* v *Taylor*, *supra*, where pure constitutional questions are presented the federal courts are indisputably empowered to exercise full habeas corpus jurisdiction. *Burns* v. *Wilson*, *supra* at 142; *Shaw* v. *United States*, 357 F. 2d 949, 954 (Ct. Cl. 1966); *Gibbs* v. *Blackwell*, 354 F. 2d 469, 471 (5th Cir. 1965). See also Hart & Wechsler, *The Federal Courts and the Federal System* 1238-39 (1953). The questions decided adversely to petitioner below are all questions of constitutional law. See Statement of Questions Presented, *supra*, p. 3.

[3] This argument, of course, presupposes that the inevitable court martial tribunal will allow petitioner to raise his substantive defenses. No authority is given in support of this proposition in any of the opinions below, and none was provided by respondents in their briefs, other than the suggestion that in a court martial for disobedience of an order, the lawfulness of the order may be raised as a defense. But no cases are cited from military or civil tribunals. Moreover, reliance on a court martial defense will predictably be futile. See transcript of court martial of *United States* v. *Brown*,

A court martial, which is a criminal *judicial* proceeding, is plainly not an element of the *administrative* process. To require exhaustion of such criminal proceedings in no way comports with the purpose of the exhaustion doctrine, which is to permit administrative officials with presumed expertise to render initial judgments concerning matters within their special competence. It is clearly not within the special competence of a court martial to determine the validity of applications for conscientious objector status.[4]

The cases cited by the courts below do not support their rulings. Petitioner is not seeking to collaterally attack, either by way of injunction or by avoiding the normal military review of court martial judgments, on-going criminal court martial proceedings. Thus, *Gusik* v. *Schilder*, 340 U. S. 128 (1950), and similar cases referred to by the District Court (App. 13a-14a) are inapposite. They reflect the routine application of the exhaustion doctrine as applied to criminal proceedings in the military and civil courts alike. This case is an attempt to review an *administrative*, not a criminal proceeding.

Certiorari should be granted to determine whether the essentially administrative process of adjudicating and reviewing conscientious objector applications can be converted by the military into a criminal prosecution.

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tried in Ft. Dix, N. J., on September 18, 1967, where the attempt to introduce the defense of an improper denial of a conscientious objector claim was rebuffed by the law officer.

[4] A doctor or lawyer denied a license by the administrative body charged with issuing licenses is not obliged to set himself up in practice without a license, and suffer arrest, prosecution, and possible incarceration in order to challenge the validity of the denial of his application. Even in the absence of a specific statute authorizing judicial review of the administrative action, there is surely a right to seek judicial relief in advance of prosecution.

B. The proposition that an individual is required to undergo the risks of punishment inherent in a military court martial in order to satisfy the exhaustion doctrine runs counter to the well-developed principle of this Court condemning unfounded procedural obstacles which deter the exercise of constitutional rights under the First Amendment. See, e.g., *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967); *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Baggett* v. *Bullitt*, 377 U. S. 360, 379 (1964); *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 433 (1963); *Speiser* v. *Randall*, 357 U. S. 513 (1958).

The interest of preserving the free exercise of religious liberty under the First Amendment is no less than that of preventing a chilling effect on the exercise of constitutionally-protected political expression. Cf. *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

The jurisdictional obstacle constructed below in the name of exhaustion can only operate to discourage the free exercise of constitutional rights. It serves no valid countervailing interest of the Air Force. Whether a final judicial determination of the substantive issues is made at this juncture, or after court martial proceedings, should be of little real significance to any valid interest of the Air Force. The very limited disruption of internal military affairs is the same at both points.

If there are any reasons based on military exigencies for delaying judicial review until after court martial conviction, they have not yet been asserted by either the respon-

dents, or, with respect, the courts below.[5] On the other hand, because the risk of punishment will obviously deter the assertion of at least some meritorious claims of conscientious objection, the significant interests protected by our national policy of recognition of conscientious objectors will be the ultimate losers.

Significantly, the Court need not go as far as *Dombrowski* and its progeny warrant. For example, in *Wolff* v. *Selective Service System Local Bd. No. 66*, 372 F. 2d 817 (2d Cir. 1967), a panel comprising Judges Medina, Friendly and Smith ruled that a justiciable controversy was presented by the action of a local draft board in reclassifying registrants who had participated in Vietnam War demonstrations, even though they had not exhausted administrative remedies under the Selective Service Act.[6] Here, there is no necessity to abort an imminent criminal prosecution (as in *Dombrowski*) or to short-circuit a conceded element of the administrative process (as in *Wolff*); nor is there a need even to go as far as *Toth* v. *Quarles*, 350 U. S. 11 (1955) or *Reid* v. *Covert*, 354 U. S. 1 (1957), where this Court saw fit to intrude the judicial power of the United States into *unconcluded* court martial proceedings.

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[5] The Court of Appeals stated that it was "unwilling to expand the *Dombrowski* doctrine", because "To do so would run contrary to established law." 378 F. 2d at 540, App. 21a, and then it cited only pre-*Dombrowski* decisions, *ibid.*, fn. 2.

[6] For other cases where lower federal courts have granted relief without requiring exhaustion of remedies, see *Stamler* v. *Willis*, 371 F. 2d 413 (7th Cir. 1966); *Reed Enterprises* v. *Corcoran*, 354 F. 2d 519, 522 (D. C. Cir. 1965); *Carmichael* v. *Allen*, 267 F. Supp. 985, 993 (N. D. Ga. 1967).

Surely the exercise of federal jurisdiction at the *conclusion* of a military administrative proceeding is less abrasive to civil-military relations than is the intrusion of the federal judiciary into the sensitive realm of federalism through the injunction of state criminal proceedings. In fact, this Court has stated that the traditional autonomy of the military has its exact parallel in state judicial independence, *Gusik* v. *Schilder, supra* at 131-132; *Burns* v. *Wilson, supra* at 140, 142, and, as discussed above, has exercised its jurisdiction in both areas.

Accordingly, certiorari should be granted to clarify the scope of the First Amendment rights protected by the *Dombrowski* doctrine, and to review the "exhaustion" rule propounded below—which, if allowed to stand, could severely compromise the power of the federal courts to determine the constitutionality of military administrative proceedings.

C. Certiorari should also be granted to determine whether under the decision of the Court of Appeals, servicemen who apply for conscientious objector status are denied the equal protection of the laws under the Fifth Amendment. Cf. *Bolling* v. *Sharpe*, 347 U. S. 497 (1954).

By requiring a conscientious objector applicant to submit to court martial proceedings as a prerequisite to federal review of his constitutional claims, the courts below have exceeded even the harsh exhaustion requirements that have been applied under the Universal Military Training and Service Act, 50 App. U. S. C. §451 et seq. (1964). A Selective Service registrant may elect to submit to induction and immediately file a petition for habeas corpus. He need not risk criminal punishment. *Gibson* v. *United States*,

329 U. S. 338, 359 (1946); *Watkins* v. *Rupert*, 224 F. 2d 47 (2d Cir. 1955).

The equal protection guarantee forbids distinctions which are arbitrary and do not embody a proper legislative or administrative purpose. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78-79 (1911); *Barbier* v. *Connolly*, 113 U. S. 27, 31-32 (1885).

Judged by this standard there is no rational basis for distinguishing between conscientious objector claims by in-service personnel and those by Selective Service System registrants that would justify the vast difference in treatment. The mere fact that an individual finds himself within the military establishment at the time his conscientious objector beliefs mature does not justify the imposition of greater obstacles to the assertion of constitutional rights than those imposed upon his civilian counterpart.[7]

Because a bona fide acquisition of conscientious objector views can legitimately occur after an order to report for induction, *United States* v. *Gearey*, 368 F. 2d 144 (2d Cir. 1966),[8] or even after induction, AFR 35-24, Section A, Paragraph 3a, it is an unreasonable and discriminatory classification to hold that the latter are not entitled to civil judicial review.[9]

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[7] Any distinction between draftees and enlistees based on the enlistees' supposed "voluntary" entry into the military is palpably fictitious since "a high proportion of all these volunteers in the services—about four out of ten in the years before Vietnam according to Department of Defense estimates—are motivated by the existence of the draft." *Report of the President's National Advisory Committee on Selective Service* 11 (1967).

[8] *Gearey* assumes an equality of treatment of pre-induction and post-induction claimants. 368 F. 2d at 149-150, nn. 10-11.

[9] The Tenth Circuit, in its decision below, is the first Court of Appeals to affirm a holding that an in-service conscientious ob-

II.

Certiorari should be granted to determine if an otherwise fully qualified conscientious objector claimant may be barred from such status because of a refusal to oppose all wars. Such law as there is to the contrary reflects a widely-held erroneous reading of a single decision, and transgresses on constitutional limitations.

Petitioner's application for separation from the Air Force or reassignment as a conscientious objector, and the undisputed evidence adduced at the District Court Hearing below, amply establish his qualification as a conscientious objector for the relief contemplated in AFR 35-24.

Only the Air Force Secretary's view that the Regulation, and its statutory analogue in Section 6(j) of the Universal Military Training and Service Act (UMTSA)[10] apply only to persons opposed to all wars, is in dispute. The inference that this view was the sole basis for the denial of petition-

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jector applicant is not entitled to the same habeas corpus judicial review as a Selective Service applicant concededly receives under habeas corpus. Certain District Court decisions which support this view are cited by the District Court in its opinion below, 267 F. Supp. at 706, App. 13a-14a. See, however, *Gilliam* v. *Reaves*, 263 F. Supp. 378 at 384 (W. D. La. 1966): "... in our judgment, the scope for reviewing the action of a Selective Service board by habeas corpus is identical to that to be applied in reviewing the action of the army." See also *Christensen* v. *Hedrick*, unreported, Civil No. 45613, U. S. D. C., N. D. Calif., where Judge Weigel stated in colloquy at page 28 of the transcript:

> "But this Court is not lightly going to hold, because of its belief in fair play . . . that a decision can be made through an administrative process for which there's absolutely no factual basis."

[10] 50 USC App. §456(j). AFR 35-24 provides, in Section A, Paragraph 3, a, that, "Claims of conscientious objection by all persons, whether existing before or after entering military service, should be judged by the same standard." App. 24a.

er's application is clearly warranted by the sparse record of the Air Force disposition of it[11] taken together with the unqualified contentions of respondents that such is the settled state of the law.[12]

A. The Secretary's view is widely held, particularly among officials presently administering statutory or regulatory provisions for conscientious objectors.[13] But this view not only reflects a more strained reading of the statutory language; it contradicts the weight of decisional authority as well. We believe that the misreading of a single judicial decision explains this unusual variance between law and administrative viewpoint, but the law has nevertheless developed in an opposite direction from the administrators' error.

The statutory language, exempting one who

> "by reason of religious training and belief is conscientiously opposed to participation in war in any form,"

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[11] "It has been determined that you have not established that you are a conscientious objector within the meaning of AFR 35-24." Letter of January 31, 1967 to petitioner by Colonel John E. Horne, Deputy Chief of Staff, Personnel, USAF Academy. Exhibit G to the Complaint in this action (R. 64). See also the statement of Chaplain Major Dean C. Hofstad, USAF, entered in the proceedings on petitioner's application under date of December 29, 1966, as required by AFR 35-24, appearing as Exhibit K to the complaint (R. 76).

[12] See, for instance, Paragraph 2 of the Solicitor General's Memorandum in Opposition to Application for Stay Pending Certiorari filed herein June 1, 1967.

[13] See, for instance, Hershey et al., *Legal Aspects of Selective Service*, U. S. Government Printing Office (1963 Revision), p. 11. This publication is distributed by the Selective Service System "for the use of Government Appeals Agents of the Selective Service local boards and for the convenience of United States attorneys."

has remained unchanged since its adoption by Congress in the Selective Training and Service Act of 1940.[14] In it the words, "in any form," more naturally modify "participation" than "war," as was observed in *Taffs v. United States*, 208 F. 2d 329 (8th Cir. 1953), cert. den. 347 U. S. 928 (1954).[15] The administrators, themselves, moreover, when they drafted the Selective Service Regulations, so read this language, for they found that they could describe only the registrant to be classified as "I-O" (a conscientious objector to *all* military service) in the statutory language.[16] That language is significantly omitted from their parallel description of a registrant to be classified "I-A-O" (a conscientious objector available for noncombatant military

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[14] 54 Stat. 885.

[15] "The words 'in any form' obviously relate, not to 'war,' but to 'participation in' war. War, generally speaking has only one form, a clash of opposing forces. But a person's participation therein may be in a variety of forms." 208 F. 2d at 331.

[16] The pertinent regulations provide:

"*1622.11. Class I-A-O: Conscientious Objector Available for Non-combatant Military Service Only.*—(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces." 32 CFR §1622.11.

"*1622.14. Class I-O. Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest.*—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, *to be conscientiously opposed to participation in war in any form* and to be conscientiously opposed to participation in both combatant and non-combatant training and service in the armed forces." 32 C. F. R. 1622.14. (Emphasis supplied.)

service), for the Selective Service System could not describe such a registrant as one "conscientiously opposed to participation in war in any form," however universal his opposition to all wars. The I-A-O only objects to a certain *form* of participation.

Finally, the word "form" bears almost no relationship to the Secretary's distinction between universal pacifists and discriminating ones. The difference between those wars to which some pacifists will not object and others to which they will arises not merely from the "form" of such wars, but from their total character—including their causes, their objects, their geography, and the nations which are parties to them. A congressional intent to make the Secretary's distinction would have been embodied in more apt language than " . . . opposed to participation in war in any form." [17]

The one, misread case which seems to be at the bottom of what, we submit, is the Secretary's error, is *United States* v. *Kauten*, 133 F. 2d 703 (2d Cir. 1943). Judge Augustus N. Hand's dictum therein, that an exemptable conscientious objection

> "must ex vi termini be a general scruple against 'participation in war in any form' and not merely an objection to participation in this particular war[,]" 133 F. 2d at 707,

is the sole authority cited by General Hershey and his legal advisors, in the guide they distribute to lawyers involved

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[17] Such as, for instance, " . . . opposed to participation in all wars."

in administering the UMTSA,[18] for the interpretation which the Secretary is applying. But the significant fact about *Kauten* is that the defendant there was, insofar as appears from the opinion and the Report of the Hearing Officer which is set forth in the margin, an objector to *all* wars.[19] The defect which the Hearing Officer found in Kauten's application for exemption was that his objections were not religious, and in this conclusion Judge Hand concurred.[20] The significance of the dictum about objections to a particular war is manifested in the following paragraph:

> "There is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances. . . . The former is usually a political objection, while the latter, we think, may justly be regarded as a response to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent

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[18] Hershey, et al., op. cit. *supra*, note 13, p. 11, fn. 32. See also Anno., "who is entitled to exemption as a conscientious objector within §6(j) of the Universal Military Training and Service Act—Federal cases," 99 L. ed. 443, 444 (1955).

[19] "Thus it appears that the Registrant believes in Gandhi's policy of passive resistance. . . . I conclude . . . that although he may be sincere in his opposition to war, his belief does not emanate from any 'religious training and belief' . . ." Report of the Hearing Officer, 133 F. 2d at 707, fn. 2.

[20] Actually the holding in *Kauten* was procedural: that the defendant was not entitled to show error of law in his Selective Service classification as a defense to his indictment for refusal to report for induction. All of the matter referred to in text, above, follows Judge Hand's observation that, "It seems proper, however, to say that we find no error of law on the part of the Appeal Board." 133 F. 2d at 707.

of what has always been thought a religious impulse." 133 F. 2d at 708.

It is thus not the statement of a separate requirement for the exemption but rather an observation—doubtful in the light of the evidence available today[21]—that the objections of a person opposed to a particular war will "usually" be merely political and not religious.

In support of the Secretary's view petitioner's counsel have been able to find but one case (other than the *Kauten* dictum): *United States* v. *Kurki*, 255 F. Supp. 161 (E. D. Wisc. 1966). Its holding, like *Kauten*'s, was a procedural one, and its observations on the eligibility for exemption of discriminating pacifists are weakened by the fact that this issue was hurriedly submitted for the first time after the defendant had discharged one lawyer and with the assistance of another changed the whole theory of his defense. Against this sparse authority, stands the host of decisions applying the exemption to the varying positions of members of the Jehovah's Witnesses denomination.[22] All of them reject respondents' view, on occasion quite explicitly.[23]

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[21] See, for instance, the summary of theological testimony in the Statement of the Case, *supra*, p. 8.

[22] Among them are *Sicurella* v. *United States*, 348 U. S. 385 (1955), decided in the face of the observation in dissent that the petitioner "reserves the right to choose the war in which he will fight," 348 U. S. at 395; *Kretchet* v. *United States*, 284 F. 2d 561 (9th Cir., 1960), where again a dissenting opinion forcefully brought home the kinds of non-spiritual warfare—defense of the Witness' brothers, of his home against invasion—in which Kretchet was willing to engage; *Bouziden* v. *United States*, 251 F. 2d 728 (10th Cir. 1958); *Mayfield* v. *United States*, 220 F. 2d 729 (5th Cir. 1955); *Pekarski* v. *United States*, 207 F. 2d 930 (2d Cir. 1953).

[23] E.g., *Shepherd* v. *United States*, 217 F. 2d 942 (9th Cir. 1954) (Justice Department's negative recommendation, asserting uni-

The Witnesses' cases may not be dismissed simply as having carved out an exception for those willing to fight in some unreal, "theocratic war." Not only do their facts often involve explicit acknowledgement of quite real and worldly circumstances in which the individual Witness will fight,[24] but the nature of the expected "theocratic war" itself, as defined in the registrant's statements, is often far from other-worldly.[25]

It is not necessary to contend that Congress, in first adopting the language of the present Section 6(j), expressing the national policy which AFR 35-24 undertakes to follow, specifically intended to exempt discriminating scruples of the kind Captain Noyd expresses. It is, indeed, quite unlikely that Congress gave any attention at all to the distinction which administrators have subsequently sought to engraft as an additional criterion onto the exemption. But this administrative distinction has been rejected by the great weight of judicial authority which comports better with the plain meaning of the statutory words. And this body of decisional law, albeit applied heretofore to members of but one denomination (to which Captain Noyd does not belong), better expresses the most

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versal pacifist requirement, said to have led appeal board to proceed "upon an erroneous theory as to what constitutes opposition to 'participation in war in any form'. . . ." 217 F. 2d at 946.)

[24] See, e.g., *Kretchet* v. *United States, supra,* note 22.

[25] In *Shepherd* (*supra,* note 23), the applicant stated that, "he is not a pacifist and that he will fight whenever *he* considers God commands him to do so." 217 F. 2d 942. (Emphasis supplied.) Compare the following from Pfeffer, *The Liberties of an American,* 1956, at p. 31: "Exact statistics are not available, but it is a reasonable probability that in the course of human history more blood has been shed in the name of God and the gods than for any other cause."

fundamental of the legislative purposes encompassed in the statute: that it is religiously informed conscience itself, *in the matter of war and killing,* rather than some conscientious scruples of a particular formulation or content, which national policy undertakes to respect.

B. The construction which petitioner urges is essential in order to save the statute, and the regulation, from constitutional defects—to avoid "imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others. . . ." *United States* v. *Seeger,* 380 U. S. 163, 176 (1965).[26] An unwarranted discrimination based on the content of different religious beliefs—between those opposing all wars and those opposing only such as are deemed unjust—would violate both the First Amendment, *Sherbert* v. *Verner,* 374 U. S. 398 (1963), *Torcaso* v. *Watkins,* 367 U. S. 488, 495 (1961), and the due process mandate of the Fifth, *Bolling* v. *Sharpe,* 347 U. S. 497 (1954). The objectives of a national policy recognizing religiously informed scruples against war cannot be defined so as to warrant such a discrimination. Individual conscience is violated with as great injury, and the armed services are as poorly served, in either case.

As stated by Mr. Chief Justice Hughes in his dissenting opinion in *United States* v. *Macintosh,* 283 U. S. 605, at 635 (1935):

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[26] Judge Doyle, in his opinion granting preliminary injunctive relief, construed *Seeger* and *Sicurella, supra,* note 22, as not excluding petitioners: ". . . there are no particular limitations upon holding these conscientious views in terms of the kind of regimentation or the philosophy that moves one to adopt such views." App. 2a.

"Nor is there ground, in my opinion, for the exclusion of Professor Macintosh because his conscientious scruples have particular reference to wars believed to be unjust. There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for the renunciation of war presuppose a preponderant public sentiment against wars of aggression. If, while recognizing the power of Congress, the mere holding of religious conscientious scruples against all wars should not disqualify a citizen from holding office in this country, or an applicant otherwise qualified from being admitted to citizenship, there would seem to be no reason why a reservation of religious or conscientious objection to participation in wars believed to be unjust should constitute such a disqualification."

III.

Certiorari should likewise be granted to determine the extent to which the guarantees of procedural due process under the Fifth Amendment apply to military administrative proceedings.

The Court of Appeals held that:

"great and wide discretion exists in the executive department both in the formation and application of regulations and in their interpretations in such matters as what constitutes 'for the good of the service,'"

and that the military need not meet the "classical" requirements of due process, 378 F. 2d at 540, App. 21a. On

this basis the Court of Appeals upheld Air Force regulations which provide only for the right to present written evidence in support of claims for conscientious objector status. Thus, the basic and essential rights to counsel, to be heard orally, to rebut evidence through confrontation of adverse witnesses, and to a reasoned opinion based upon known evidence are not, according to the Tenth Circuit, required by "military due process."

This ruling is in direct conflict with the clear trend of judicial opinion[27] and runs counter to the core principle of the Fifth Amendment that no person may be deprived of life, liberty or property without an opportunity to be heard. See, e.g., *Londoner* v. *Denver*, 210 U. S. 373 (1908); *Greene* v. *McElroy*, 360 U. S. 474, 496-97 (1959).

This most basic right applies to civil and criminal proceedings, *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413 (1915), as well as to administrative proceedings, *Londoner* v. *Denver*, *supra*; *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 167 (1951) (concurring opinion); *Morgan* v. *United States*, 304 U. S. 1, 19 (1938). Military proceedings whether criminal, civil or administrative have been held to be subject to essentially identical Fifth Amendment due process guarantees, and the courts have refused to defer to congressional acts or military regulations establishing procedures devoid of even the minimal protections of due process.[28] See *Clackum* v. *United States*, 296

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[27] But see *Brown* v. *McNamara*, *supra* at 20 (appeal to Third Circuit pending), where the District Judge made the extravagant statement that the Secretary of Defense could, "without violating any constitutional rights, *totally deny*" any procedure for dealing with in-service conscientious objector claims. (Emphasis added.)

[28] The Constitution applies due process limits on all governmental power, "even the war power". *Galvan* v. *Press*, 347 U. S.

F. 2d 226, 228 (Ct. Cl. 1960); *Bland* v. *Connally*, 293 F. 2d 852 (D. C. Cir. 1961); *Application of Stapely*, 246 F. Supp. 316 (D. Utah 1965); *Shapiro* v. *United States*, 69 F. Supp. 205 (Ct. Cl. 1947); cf. *Williams* v. *Zuckert*, 372 U. S. 765 (1963), *Harmon* v. *Brucker, supra; Beard* v. *Stahr*, 370 U. S. 41 (1962); *Reed* v. *Franke, supra.*[29]

The Chief Justice has commented that the argument for the inapplicability of the Bill of Rights to military affairs requires

> a most extraordinary showing of military necessity in defense of the Nation. Warren, "The Bill of Rights and the Military," 37 N. Y. U. L. Rev. 181, 197 (1962).

No such "narrow" and "rare" necessities or circumstances, *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra* at 168, are present here. There is no threat to the national security. Compare *Ludecke* v. *Watkins*, 335 U. S. 160 (1948) with *United States ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950). Nor is there a question of military confidentiality. Cf. *Greene* v. *McElroy, supra.* No valid countervailing interests have been asserted by the Govern-

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522, 530 (1954). See *Overseas Media Corporation* v. *McNamara*, #20,590 (D. C. 1967) (opinion rendered October 3, 1967, holding that action of Secretary of Defense in refusing access by magazine publisher to privileged distribution system is subject to due process limits, and reversing District Court's grant of summary judgment).

[29] The United States Court of Military Appeals is in agreement. See *United States* v. *Jacoby*, 11 U. S. C. M. A. 428, 430-431, 29 C. M. R. 244 (1960): ". . . it is apparent that the protections of the Bill of Rights except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces" [citing *Burns* v. *Wilson, supra*]. And see Quinn [Chief Judge of the Court of Military Appeals], "The United States Court of Military Appeals and Military Due Process," 35 St. John's L. Rev. 225, 232 (1961).

ment or the courts below to justify these inherently unfair and prejudicial procedures. The discipline of the Air Force will not be disrupted, nor its morale impaired or its orderly functioning upset to any significant degree by the imposition of minimum constitutional safeguards.

Most important perhaps is the fact that the nature of the conscientious objector claim itself compels a hearing. The various *subjective* factors which AFR 35-24 submits to official consideration[30] in determining the validity of the claim logically require that an opportunity be accorded both sides to meet opposing arguments.

These procedural deficiencies raise serious equal protection questions, as regards the comparative rights of in-service personnel and Selective Service System registrants to procedural due process in the determination of their respective conscientious objector claims. The procedure established by the UMTSA, §6(j), 50 U. S. C. App. 456(j), provides applicants with a number of valuable procedural rights (see Complaint pp. 17-18, R. 17-18). These have been construed liberally by the federal courts. See *Simmons* v. *United States*, 348 U. S. 397 (1955); *Gonzales* v. *United States*, 348 U. S. 407 (1955); *Brewer* v. *United States*, 211 F. 2d 864 (4th Cir. 1954); *Arndt* v. *United States*, 222 F. 2d 484 (5th Cir. 1955). Cf. *United States* v. *Gearey*, *supra* at 148.

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[30] AFR 35-24, Section A, Paragraph 3c provides that the following factors be considered:

"(a) Membership in a peace church.
(b) Training in home and church.
(c) General demeanor and pattern of conduct.
(d) Employment in defense-connected activities.
(e) Participation in religious activities.
(f) Credibility (and that of persons supporting his claim)." App. 24a.

Congress has recognized the necessity of full procedural guarantees for an equitable resolution of contested conscientious objector claims. Air Force regulations must be designed so as to fully effectuate this right. Logic and well-established constitutional principles mandate some type of fair hearing as the only adequate means of ensuring a fair determination on the merits.

The Court of Appeals erroneously misconstrued petitioner's argument as insisting on "the classical requirements of due process," and then did not indicate what kind of due process, if any, petitioner was entitled to. It is clear that petitioner did not receive any kind of meaningful due process, classical or otherwise. A grant of certiorari is therefore of the greatest public importance, in order to set forth the constitutional metes and bounds of due process for in-service conscientious objector claims.

IV.

AFR 35-24 provides in part, in Section B, paragraph 6a:

> "An officer or an airman who professes to be a conscientious objector may submit a resignation or application for separation to his immediate commander. The commander will forward the case in accordance with the regulation under which submitted, to Hq USAF (AF PMPKA) for final determination. Each forwarding indorsement will include a recommendation of approval or disapproval of the request, with a statement of the *reasons therefor*" (emphasis supplied). App. 25a.

When petitioner submitted his application under AFR 35-24, the respondent General Moorman, the Superinten-

dent of the Academy, was his immediate commander. General Moorman forwarded the case with a recommendation of disapproval as follows:

> "I recommend disapproval of his request for release from active duty based on his unfulfilled service commitment. It appears that his application for resignation does not meet the requirements of AFR 35-24 and is forwarded to Hq USAF for final determination." (Letter of 31 December 1966, admitted below as Government's Exhibit 4.) R. 289.

General Moorman was under an obligation at this point to determine the validity of appellant's application and include within his decision the reasons therefor. General Moorman's recommendation of disapproval entirely failed to satisfy this requirement.

General Moorman's statement that appellant did not meet the requirements of the regulation merely restated his conclusion that the request should be disapproved. It was not a "basis of cause", "justification", "explanation", "support", "ground", "motive", or "proof" for such disapproval.[31] Consequently, it could not be a "reason" for the disapproval.

If such a statement were considered a "reason" under AFR 35-24 for the recommendation of disapproval, the requirement of "reasons" would serve no useful purpose. At the very least, the requirement of "reasons" is designed to aid in making the final decision by revealing the basis for

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[31] See definitions of "reason" in any standard dictionary. See also *Barry* v. *O'Connell*, 303 N. Y. 46, 100 NE 2d 127, 129 (1951); *Brackett* v. *Board of Appeal of Building Department*, 311 Mass. 52, 39 NE 2d 956, 958 (1942).

the opinion of the officer most directly in contact with the applicant for separation. The requirement of "reasons" serves to check arbitrary recommendations by the immediate commanding officer and to make him consider more carefully what action should be taken. It also aids USAF Headquarters in evaluating the recommendation of the immediate commanding officer. This protection is much less than would be afforded by a hearing and accompanying due process guarantees. But where few procedural rights are given, it is particularly important to maintain the ones which do exist.

Since the recommendation of General Moorman did not contain the "reason therefor", the Air Force violated its own regulations in the process of deciding appellant's application. These regulations are binding on the Air Force, and a decision rendered in violation of them is invalid.[32] See *Vitarelli* v. *Seaton*, 359 U. S. 535, 540 (1959) ("... the Secretary here ... was bound by the regulations which he himself had promulgated for dealing with such cases...."); *Service* v. *Dulles*, 354 U. S. 363 (1957); *U. S. ex rel. Accardi* v. *Shaughnessy*, 349 U. S. 286 (1954). Administrative regulations of a military department are no less binding than any other administrative regulations. *Ingalls* v. *Zuckert*, 309 F. 2d 659 (D. C. Cir. 1962); *Smith* v. *United States*, 155 Ct. Cl. 682 (1961).

The Court of Appeals erred by holding that one must strain to find even an "overtone of constitutional inva-

[32] See *United States* v. *Mason*, #4207, U. S. D. C., D. Mont. decided on September 15, 1967. In a judgment of acquittal, the Court held that similar failure to supply reasons in processing an in-service conscientious objector application rendered the rejection of such application a nullity.

lidity", 378 F. 2d at 540, App. 21a in this plain deprivation of a substantial procedural right granted by regulation. Certiorari should be granted to dispel the confusion bound to be created by a decision which suggests that in some instances the military need not obey their own regulations, but does not set forth any standards or guidelines.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 13, 1967

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* Petitioner's attorneys gratefully acknowledge the research assistance of Mr. David Rudovsky, graduate student at University of Pennsylvania Law School, and Mr. Roger Dunwell, second-year student at New York University School of Law, and express their appreciation to the Law Students Civil Rights Research Council.

APPENDIX

Opinion of the District Court, District of Colorado, Dated March 29, 1967

WILLIAM E. DOYLE, *U.S.D.J.*:

This is an action in which the plaintiff, in a lengthy complaint in which he names the Secretary of Defense, Secretary of the Air Force, Chief of Staff of the Air Force, Superintendent of the Air Force Academy and other officials, seeks declaratory relief and applies for habeas corpus, seeks injunctive relief and, at the moment seeks a preliminary injunction.

The factual basis for this is that plaintiff has declared himself to be a conscientious objector and, notwithstanding that fact, the Air Force proposes to transfer him to Cannon Air Force Base, New Mexico, as of April 1, 1967. The allegation is that this is a training base, or, jumping-off base for Vietnam, and that he will be compelled, contrary to his beliefs, to at least train fliers who are going to Vietnam, and he says that this is work that is contrary to his conscientious scruples.

APPENDIX

It is to be gleaned from reading the complaint and from statements of counsel that plaintiff is not a member of any religious group, but rather that he holds a philosophy which he declares as "ethical humanism" which dictates these scruples against war. It is also to be gleaned that he does not object to all war; that he objects rather to particular wars of aggression, but specifically to the Vietnam War and that he would not be a conscientious objector if it were a matter of defending the United States. He doesn't rule out the possibility that he would go to foreign countries first in order to carry out an assignment of defending the United States.

From this it is maintained by the defendants that he is not entitled to be classified as a conscientious objector and

lidity", 373 F. 2d at 540, App. 21a in this plain deprivation of a substantial procedural right granted by regulation. Certiorari should be granted to dispel the confusion hereby said to be created by a decision which suggests that in some instances the military need not obey their own regulations, but does not set forth any standards or guidelines.

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It is to be gleaned from reading the complaint and from statements of counsel that plaintiff is not a member of any religious group, but rather that he holds a philosophy which he declares as "ethical humanism" which dictates these scruples against war. It is also to be gleaned that he does not object to all war; that he objects rather to particular wars of aggression, but specifically to the Vietnam War and that he would not be a conscientious objector if it were a matter of defending the United States. He doesn't rule out the possibility that he would go to foreign countries first in order to carry out an assignment of defending the United States.

From this it is maintained by the defendants that he is not entitled to be classified as a conscientious objector and

that it is clear from the record as applied to the statute involved, 50 U. S. C. §456(j), that he is not opposed to war in any form. A definition contained in the statute is called to the Court's attention, and although it is set up in a somewhat left-handed way, it suggests this interpretation. However, an examination of the cases does not bear this out because the Supreme Court has given a broad interpretation to the term, particularly the Seeger case which was cited to me, *United States* v. *Seeger,* 380 U. S. 163, 88 S. Ct. 850 (1965). Although it doesn't deal specifically with whether one can be a conscientious objector in a limited way, it does indicate that there are no particular limitations upon holding these conscientious views in terms of the kind of regimentation or the philosophy that moves one to adopt such views. Moreover, a similar judicial viewpoint, attitude, or approach is made in *Sicurella* v. *United States,* 348 U. S. 404, 75 S. Ct. 403 (1965), so that I must conclude from reading these cases that the complaint is not entirely without substance and that it does demand that the case be given further study.

It has also been strongly urged by the defendants that we do not have jurisdiction to hear and determine the matter. Yet, an almost identical motion was considered by the Court of Appeals for the District of Columbia in the case of *Gallagher* v. *Quinn,* 363 F. 2d 301, in an opinion by Judge Fahy, which specifically recognizes that there is jurisdiction over the subject matter in a factual context similar to this one. So I do feel that it is a case in which a full hearing should be had, either now or later. Indeed, it is going to have to be had, and if this Court were to dismiss this complaint upon the basis of the brief hearing that was had here today, I think that it almost certainly would be referred back for a hearing in depth on its merits.

So, without determining definitely that the cause is one that is meritorious, without intending to establish any precedent for this type of case, it is this Court's conclusion that there is enough merit expressed and there is probable jurisdiction shown justifying the granting of some kind of relief, with a view to taking a closer look at it in an unhurried atmosphere and after both sides have had an opportunity to prepare themselves.

I note that this case was filed on Monday. I have had no opportunity to read the complaint. We heard it this morning. I have been tied up all afternoon and have not had an opportunity to study it. The views expressed are not studied, but they are viewpoints I have arrived at from hearing counsel and from the limited amount of study I have given it. I do feel that this requires a full hearing and this is why I have determined that a preliminary injunction should issue against assigning the plaintiff to combat activity or requiring him to perform duties whereby he will be perhaps faced with the necessity of a General Court Martial or other proceedings that might injure him as a practical matter. I do not wish to interfere with the power of the Air Force to move him from one place to another; in other words, I do not wish to exercise any more power than is necessary under the circumstances and, accordingly, the injunction, or restraining order which is entered is against requiring the plaintiff, until the further order of the Court and until a hearing on the merits can be had, to perform combat-type activity, directly or indirectly. The Court does hold that it retains jurisdiction of the controversy and it is suggested that we try the case on the merits in about three weeks from today, Wednesday, April 19, commencing at 9:30 o'clock a.m.

I would ask counsel to prepare an order consistent with the statements made here.

Opinion of the District Court for the District of Colorado, Dated April 25, 1967

WILLIAM E. DOYLE, *U.S.D.J.*:

Action by Air Force officer seeking declaratory relief, injunction and writs of habeas corpus and mandamus because of refusal of defendants to recognize officer's asserted status as conscientious objector and to assign him accordingly, or in alternative, to accept his resignation. The District Court William E. Doyle, J., held that where Air Force officer had twice made applications for separation or for assignment recognizing his conscientious objector views, and both applications had been refused, officer would be required to exhaust remedies within military establishment and court was without jurisdiction to hear officer's claim in action designed to spare officer from military justice.

Order accordingly.

Marvin M. Karpatkin, New York City, William F. Reynard, Denver, Colo., for plaintiff, Ernest Angell, John de J. Pemberton, Jr., Melvin L. Wulf, Eleanor H. Norton and Rhoda H. Karpatkin, New York City, of counsel.

Lawrence M. Henry, U. S. Atty., for Dist. of Colorado, Denver, Colo., Barefoot Sanders, Asst. Atty. Gen., Harland F. Leathers, Frederick W. Drogula and C. Westbrook Murphy, Attys., Dept. of Justice, Washington, D. C., for defendants.

MEMORANDUM OPINION AND ORDER

WILLIAM E. DOYLE, District Judge.

Plaintiff, a regular commissioned officer in the United States Air Force, seeks declaratory relief, an injunction

and writs of habeas corpus and mandamus. The demands for relief stem from the refusal of the defendants to recognize plaintiff's asserted status as a conscientious objector and to assign him accordingly or, in the alternative, to accept his resignation from the Air Force.

Plaintiff Noyd is an Air Force captain and has been a regular commissioned officer for over eleven years. He received his commission in 1955 following graduation with distinction from Washington State University as a member of the Air Force Reserve Officers' Training Corps. Upon entry on active duty he applied for and received eighteen months of flying training. From May, 1957 to May, 1960, he was assigned to a combat unit in England as a tactical fighter pilot. In 1958, plaintiff applied under the Air Force education program to enter graduate school in the field of psychology. His application was approved and he attended the University of Michigan for three years from June, 1960 to June, 1963, receiving a master's degree and completing one year of work toward the doctoral degree. During this period plaintiff was regularly promoted and received full pay and allowances. He in addition had his tuition and other college expenses paid. As a result of this educational program, plaintiff incurred a continuing service obligation of six years. This obligation expires in June of 1969.

During the summer of 1963, plaintiff was transferred to the United States Air Force Academy where he was assigned as an Assistant Professor in Psychology. It appears that on December 8, 1966, while thus assigned, plaintiff submitted a letter of resignation to the Academy Superintendent under the provisions of paragraph 16m, Air Force Regulation 36-12,[1] for the "best interest" of the

[1]Air Force Regulation 36-12, "Administrative Separation of Commissioned Officers and Warrant Officers of the Air Force,"

service. In this letter plaintiff stated that he was "opposed to the war that this country is waging in Vietnam * * *" The reasons given were essentially political in nature; however, the plaintiff did make reference to his belief in "ethical humanism."[2] In the same letter, plaintiff also stated that he was "not a pacifist," acknowledging a belief in the necessity to employ force to deter or repel "totalitarian aggression."

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dated August 1, 1963, provides as follows under paragraph 16, *Resignation Resulting in Honorable Discharge*:

> "M. *Other Miscellaneous Reasons.* Within the time limitations specified in paragraph 14 above, officers who are not eligible to tender their resignations under any criteria contained in a through l above, may tender their resignations under this paragraph, if they can establish that their separation from the service will be in the best interest of the Air Force. Each resignation tendered under this paragraph will be considered on the individual merits of the case and normally will not be approved unless it is established that separation of the officer will be in the best interest of the Air Force. (SDN 610)"

[2] "It would appear that I am no longer a loyal Air Force officer if this loyalty requires unquestioning obedience to the policies of this nation in Vietnam. I cannot honestly wear the uniform of this country and support unjust and puerile military involvement. Although it may be inconsistent, I have been able to justify (or rationalize) my position here at the Academy by my belief that my contribution in the classroom has had more effect in encouraging rationalism, a sense of humanism, and the development of social consciousness than it has had in the inculcation of militarism. My system of ethics is humanistic—simply a respect and love for man and confidence in his capability to improve his condition. This is my ultimate loyalty. And, as a man trying to be free, my first obligation is to my own integrity and conscience, and this is of course not mitigated by my government's permission or command to engage in immoral acts. I am many things before I am a citizen of this country or an Air Force officer; and included among these things is simply that I am a man with a set of human values which I will not abrogate. I must stand on what I am and what I believe. The war in Vietnam is unjust and immoral, and if ordered to do so, I shall refuse to fight in that war. I should prefer, and request, that this resignation be accepted."

Plaintiff's letter was submitted through channels to the Secretary of the Air Force, who denied the request on December 29, 1966. Meanwhile, on December 16, 1966, plaintiff addressed a second letter requesting that any reassignment be to duties providing minimum conflict with his professed beliefs. He had by this time learned that he was to be transferred to Cannon Air Force Base, New Mexico, purportedly for assignment to the Twenty-seventh Tactical Fighter Wing. The allegation is that this is a training base, or jumping-off base for Vietnam, where plaintiff would either be prepared for personal assignment to the combat zone, or would train others for such duty.

On December 28, 1966, plaintiff submitted a third letter alternatively requesting separation as a conscientious objector under the provisions of Air Force Regulation 35–24. This regulation provides for the recognition of a bona fide claim of conscientious objection by a member of the Air Force "to the extent practicable and equitable."[3] This

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[3] The stated purpose of Air Force Regulation 35–24, dated March 8, 1963, is to establish "uniform procedures for the utilization, assignment, and consideration of requests for separation of conscientious objectors." It implements Department of Defense Directive 1300.6, "Utilization of Conscientious Objectors and Procedures for Processing Requests for Discharge Based on Conscientious Objection," dated August 21, 1962. Paragraph 2 of the Regulation provides:

2. Air Force Policy:

"a. *Appointment or Enlistment of Conscientious Objectors.* The Air Force does not accept individuals (other than physicians or dentists) who claim conscientious objection to military service for appointment as officers or for enlistment in the active force or the Reserve forces. Cases may arise, however, in which individual members profess a conscientious objection after entering military service.

"b. *Recognition of Conscientious Objection.* The fact of conscientious objection does not exempt men from the draft. However,

letter was submitted as an addendum to plaintiff's original request, and it repeated the ground for separation therein set forth. It also contained an explanation of his humanist beliefs which were defined by him as "respect and love for man, faith in his inherent goodness and perfectability, and confidence in his capability to ameliorate some of the banes of the human condition." Noyd was specific in asserting that he does not believe in the traditional Christian

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the Congress has deemed it more essential to respect an individual's religious beliefs than to force him to serve in the Armed Forces. Accordingly, bona fide religious objection to participation in war, in any form, has been recognized to the extent that such an objector is not inducted into the Armed Forces but is required to serve his country for the same period of time in civilian work contributing to the maintenance of national health, safety, or interest. Consistent with this national policy, bona fide conscientious objection by a member of the Air Force will be recognized to the extent practicable and equitable.

"c. *Claim to Exception From Military Service.* Federal courts have held that a claim to exemption from military service under the Universal Military Training and Service Act must be interposed prior to notice of induction. Failure to make timely claim for exemption constitutes a waiver of the right to claim. Therefore, the Air Force cannot entertain a request for separation based solely on conscientious objection:

"(1) Which existed but was not claimed before entry on active duty or enlistment.

"(2) Which was claimed, and denied by Selective Service, before entry into military service.

"d. *Separation.* No vested right exists for any individual to be separated from military service at his own request before the expiration of his term of service, whether he is serving voluntarily or involuntarily. Administrative separation before completion of the term of service is discretionary with the Secretary of the Air Force, on the basis of judgment of the facts and circumstances in the case. The Air Force normally will separate members for whom a classification as conscientious objector is recommended (see paragraph 3b), except that a member for whom a 1-A-O classification is recommended will not be separated until he has completed two years of active service (see paragraph 8a(2))."

concept of a personal or anthropomorphic God,[4] and does not claim membership in a particular religious organization.[5] He reiterated that he is not a "total pacifist."[6] Accompanying the letter was a statement from plaintiff's Base chaplain testifying to his sincerity and recommending that he be utilized in areas other than Vietnam. However, the chaplain stated that he could not classify plaintiff as a conscientious objector.

On January 24, 1967, the Secretary of the Air Force again refused plaintiff's tender of resignation. Subsequently, plaintiff received orders assigning him to the Twenty-seventh Tactical Fighter Wing, Cannon Air Force

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[4] "The 'God' in which I believe transcends the traditional Christian God and yet does not transcend human experience and faith built upon that experience; it is an ultimate concern for man, his purpose, and his possibilities. Part of the essence of that in which I believe is captured by Tillich: '"God" is the answer to the question implied in man's finitude; he is the name for that which concerns man ultimately. This does not mean that first there is a being called God and then the demand that man should be ultimately concerned about him. It means that whatever concerns a man ultimately becomes God for him' * * *"

[5] Plaintiff's only professed "affiliation" is as a "spiritual ally of the American Humanist Association." This organization was incorporated as an educational membership organization in 1941 to represent the views of humanists in the United States and Canada. It is a founding member of the International Humanist Ethical Union, and publishes a bi-monthly journal entitled the "Humanist."

[6] "I am not a total pacifist; I believe that the use of force, or the threat of force, is sometimes necessary and just when used in self-defense, both for an individual and for a nation. I should support the use of force by a nation, or preferably the community of nations, in the defense of a nation whose integrity and existence is threatened by an external aggressor—and when all peaceful attempts at conflict resolution have proven futile. * * * I cannot prognosticate what future wars of this nation I could support. I know only that the war the United States is waging in Vietnam is unjust and immoral, that it does violence to my conscience and beliefs, and that it is impossible therefore for me to participate in, or contribute to, that war."

Base, New Mexico, for upgrading in the F–100 aircraft. This aircraft is currently being used in Vietnam, and the probability is strong that anyone receiving training at Cannon can anticipate transfer to the combat zone. At this point, plaintiff filed his complaint here on March 27, 1967, seeking the relief described above.

Plaintiff's threefold contentions may be summarized as follows: He first asserts that the denial of his application for recognition as a conscientious objector violates his rights under the Constitution and relevant statutes and regulations. *Secondly,* he attacks the constitutionality of AFR 35–24 as lacking the minimum criteria of procedural due process. His third allegation is that the Air Force failed to follow the provisions of AFR 35–24, in that the Air Force failed to give reasons for the disapproval of his application.

We heard arguments on March 29, 1967, and entered a preliminary order noting probable jurisdiction. We temporarily enjoined defendant from requiring plaintiff to perform any combat-type activity, directly or indirectly. We did not interfere with the transfer of plaintiff to Cannon Air Force Base, but limited the injunction to the type of duty to which plaintiff could be assigned. At the same time, we set the case down for a hearing on the merits on April 19, 1967.

On April 12, 1967, defendant filed alternative motions to dismiss and for summary judgment. The assertions of the motion to dismiss were that plaintiff has failed to exhaust his administrative remedies; that the Constitution vests exclusive authority to govern the duty assignments of military personnel in the President and in Congress; that this action is an unconsented suit against the United

States; and that the complaint fails to state a claim upon which relief can be granted. Among other things, the defendants stress that the Government has invested over $250,000.00 in giving plaintiff the training he has received; that there now exists a shortage of trained pilots in the combat zone in Vietnam; and that plaintiff voluntarily committed himself to service to June, 1969, when he accepted his educational training at the University of Michigan. These arguments are made in conjunction with the provision of AFR 35–24, which provides for the recognition of a bona fide claim of conscientious objection by a member of the Air Force only "to the extent practicable and equitable." See note 3, supra.

We proceeded with the previously scheduled hearing on April 19, 1967, notwithstanding the jurisdictional allegations made in defendants' motion to dismiss, reserving decision on the question of jurisdiction until plaintiff's responsive brief had been received. We also allowed plaintiff to submit evidence in further explanation of his beliefs and to call distinguished theologians and philosophers who testified in some depth to the spiritual and religious relationship between ethical humanism and organized religion.

The threshold question is whether this court has jurisdiction to entertain the suit and to grant the relief requested. On its face it is a collateral attack on an administrative decision which attack is made prior to the completion of proceedings in the department. It anticipates the refusal of the Air Force to recognize plaintiff's stand and seeks to avoid court martial proceedings and the imposition of sanctions. Thus, the initial question is whether plaintiff has exhausted the remedies which exist within the military establishment whereby this court can entertain the action.

As stated above, plaintiff has twice made applications for separation or for assignment which recognizes his conscientious objector views, and both applications have been refused. He maintains that this sufficiently demonstrates the futility of continued efforts within the Air Force. He asserts that to refuse to grant declaratory relief would unreasonably force him to violate military orders and would place him in jeopardy—that this is contrary to the theory and purpose of declaratory proceedings. The difficulty is that the cases do not support the plaintiff in this position. We are, of course, familiar with the exhaustion principle as applied to state court proceedings. It arises in the state prisoner cases among others. It is a species of abstention designed to limit federal intervention to cases which present clear cut federal questions and to give other tribunals full opportunity to first consider the questions. It has been applied consistently to military adjudications.

One of the early Supreme Court decisions which applied this principle was Wales v. Whitney, 114 U. S. 564, 5 S. Ct. 1050, 29 L. Ed. 277 (1885). There the plaintiff sought in a habeas corpus proceeding to challenge the validity of military orders. The Supreme Court upheld the lower court's decision denying relief. It ruled that the civil court lacked jurisdiction, but that he could raise the legality of the order in the military court.

In a relatively recent decision, Gusik v. Schilder, 340 U. S. 128, 71 S. Ct. 149, 95 L. Ed. 146 (1950), the Supreme Court again adhered to this approach in a case in which there had been conviction but the petitioner had not sought a new trial. The petitioner had been convicted of murder by court-martial and had exhausted all of his then existing remedies. The petitioner had not utilized a subsequently-adopted pro-

vision which allowed the Judge Advocate to grant a new trial in any court martial case. The District Court had issued the writ. In affirming the decision of the Court of Appeals reversing this judgment, the Supreme Court said:

> "If Article 53 had been in force when the habeas corpus proceedings were instituted, the District Court would not have been justified in entertaining the petition unless the remedy afforded by the Article had first been exhausted. An analogy is a petition for habeas corpus in the federal court challenging the jurisdiction of a state court. If the state procedure provides a remedy, which though available has not been exhausted, the federal courts will not interfere. This is not only the holding of the Court in a long line of cases [citing cases]; it is the rule which Congress recently wrote into the Judicial Code. 28 U. S. C. § 2254, 28 U. S. C. A. § 2254. The policy underlying that rule is as pertinent to the collateral attack of military judgments as it is to collateral attack of judgments rendered in state courts" 340 U. S. at 131, 132, 71 S. Ct. at 151.

The Court of Appeals for the Tenth Circuit has consistently adhered to this rule. It has been so in cases in which military court martial proceedings had been instituted. Gorko v. Commanding Officer, 10 Cir. 1963, 314 F. 2d 858; Spencer v. Hunter, 10 Cir. 1949, 177 F. 2d 370, cert. denied 344 U. S. 869, 73 S. Ct. 112, 97 L. Ed. 673; Simmons v. Hunter, 10 Cir. 1960, 179 F. 2d 664, cert. denied 339 U. S. 968, 70 S. Ct. 984, 94 L. Ed. 1376; McMahan v. Hunter, 10 Cir. 1950, 179 F. 2d 661, cert. denied 339 U. S. 968, 70 S. Ct. 985, 94 L. Ed. 1376; Reck v. Hunter, 10 Cir. 1950, 179 F. 2d 784; Dickens v. Hunter, 10 Cir. 1950, 179 F. 2d 784; Hunter

v. Beets, 10 Cir. 1950, 180 F. 2d 101, cert. denied 339 U. S. 963, 70 S. Ct. 997, 94 L. Ed. 1372; McKinney v. Finletter, 10 Cir. 1953, 205 F. 2d 761.

In Gorko v. Commanding Officer, supra, the United States Court of Military Appeals had reversed petitioner's murder conviction and the case had been set for a second court martial trial at the time the petitioner sought a writ of habeas corpus in said District Court. He alleged in the petition that he was being placed in double jeopardy as a result of the upcoming re-trial. The Court of Appeals, however, held that he had not exhausted his military remedies, saying:

> "Exhaustion of all available military remedies is required before reliance may be had on habeas corpus. The Uniform Code of Military Justice provides that no person, without his consent, may be tried a second time for the same offense. The adequacy and availability of the military remedy is not questioned. Consideration of the question by the courts is, accordingly, premature."

In the other cited cases petitions seeking habeas corpus by individuals incarcerated in federal prisons pursuant to court martial conviction were denied for failure to exhaust remedies afforded by Article 53 of the Articles of War, 10 U. S. C. § 1525, now 10 U. S. C. § 873.

There is good reason for the strict requirement of exhaustion as a prerequisite to jurisdiction. In part it is based on the separation of powers and particularly the desirability of allowing the military to govern its own affairs without interference from the courts. If courts were allowed to entertain these suits at any stage of the military proceedings, the delays incident to litigation could

of themselves render military orders ineffectual. These expressions are contained in the opinion of the Supreme Court in Orloff v. Willoughby, 345 U. S. 83, 73 S. Ct. 534, 97 L. Ed. 842, wherein the petitioner sought to enjoin his duty assignment. The Court said:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. While the courts have found occasion to determine whether one has been lawfully inducted and is therefore within the jurisdiction of the Army and subject to its orders, we have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.
>
> "• • • Discrimination is unavoidable in the Army. Some must be assigned to dangerous missions; others find soft spots. Courts are presumably under as great a duty to entertain the complaints of any of the thousands of soldiers as we are to entertain those of Orloff. The effect of entertaining a proceeding for judicial discharge from the Army is shown from this case. Orloff was ordered sent to the Far East Command, where the United States is now engaged in combat.

> By reason of these proceedings, he has remained in the United States and successfully avoided foreign service until his period of induction is almost past. Presumably, some doctor willing to tell whether he was a member of the Communist Party has been required to go to the Far East in his place. It is not difficult to see that the exercise of such jurisdiction as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities." 345 U. S. at 93, 95, 73 S. Ct. at 540.

Plaintiff maintains that the exhaustion of remedies principle expressed in the cases does not apply to the conscientious objector case; that such a petitioner need only follow out the remedies provided in the procedural regulation pertaining to conscientious objectors. The courts which have considered this specific question have, however, required exhaustion in this type of case as well as the court martial case. See Brown v. McNamara, D. C. N. J., 1967, 263 F. Supp. 686; Chavez v. Fergusson, N. D. Cal. 1967, 266 F. Supp. 879. See also Petition of Green, S. D. Calif., S. D. 1957, 156 F. Supp. 174. We can see no difference from the standpoint of exhaustion of remedy and abstention by Federal Courts between the conscientious objector case and the others which are processed in military courts. No good reason is apparent why the military should not have primary jurisdiction to hear and determine the question in the conscientious objector case as well as in the case in which the service man faces military justice proceedings.

Plaintiff refers us to the line of cases[1] which allow inductees to challenge a wrongful induction by way of habeas

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[1] E.g., Gibson v. United States, 329 U. S. 338, 67 S. Ct. 301, 91 L. Ed. 331 (1946); Billings v. Truesdell, 321 U. S. 542, 64 S. Ct. 737, 88 L. Ed. 917 (1944).

corpus, contending that there is no valid distinction between the conscientious objector who unsuccessfully asserts his claim during the induction proceedings and thereafter attempts to gain release through habeas corpus and the individual who seeks release following voluntary enlistment. The latter has subjected himself to the military establishment and it is not unreasonable to require him to exhaust his remedies within that establishment before coming to court. The person who challenges the validity of his induction has never submitted himself to the military tribunals. Plaintiff has been a part of the military for many years. He has enjoyed its benefits and it is not unreasonable to require him to face its burdens.

When we first considered this case we noted probable jurisdiction on the basis of Gallagher v. Quinn, 1966, 124 U. S. App. D. C. 172, 363 F. 2d 301, cert. denied 385 U. S. 881, 87 S. Ct. 167, 17 L. Ed. 2d 108. We now conclude that it is not authority in the present context. In that mandamus suit which sought to compel the Court of Military Appeals to review his conviction of robbery, there was not the exhaustion problem which asserts itself here. A constitutional question[8] was there raised which could not be taken to the Supreme Court, and hence if the United States District Court for the District of Columbia had not taken jurisdiction the constitutional question could not have been considered by the courts. This possibility does not exist here. The contrast between *Gallagher* and the case at bar is thus clear.

We conclude that we are without jurisdiction to hear the plaintiff's claim. It is a collateral attack regardless of

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[8] Specifically, he asserted that the review provisions of the Uniform Code of Military Justice (10 U. S. C. §867(b)) denied him equal protection of the laws contrary to the due process clause of the Fifth Amendment.

whether it is considered in the framework of habeas corpus, injunction, or declaratory judgment, and the result is always the same. We must restrain ourselves from interfering with the military processes. Plaintiff would have us short-circuit all of these proceedings so as to spare him from military justice. This we can not do. He has been a part of the military establishment for twelve years, and he can not now gain his freedom by a short cut court action. We do not reach the merits of plaintiff's case and hence we do not deny his sincerity or reject his particular basis for claiming that he is a conscientious objector.

It is concluded that the relief prayed for must be denied. It is

Ordered that the restraining order be dissolved and that the complaint be dismissed. Counsel for the Government will submit an appropriate order for the signature of the Court.

Opinion of the Court of Appeals for the Tenth Circuit

PER CURIAM:

Action by air force officer for declaratory and injunctive relief and relief by writ of mandamus or habeas corpus to establish his status as conscientious objector and require air force to assign him to duty consistent with his subjective conscience or accept his resignation. The United States District Court for the District of Colorado, William E. Doyle, J., 267 F. Supp. 701, denied relief, and appeal was taken. The Court of Appeals held that district court lacked jurisdiction to entertain the action in view of officer's failure to exhaust military process beyond administrative remedies under air force regulations.

Affirmed; restraining order continued for 10 days to allow appellant opportunity to pursue certain remedies.

Marvin Karpatkin, New York City (John de J. Pemberton, Jr., Rochester, Minn., American Civil Liberties Union, William F. Reynard, Denver, Colo., Norman Dorsen, and Ernest Angell, Melvin L. Wulf, Eleanor H. Norton and Rhoda H. Karpatkin, New York City, of counsel, were with him on the brief), for appellant.

C. Westbrook Murphy, Dept. of Justice (Barefoot Sanders, Asst. Atty. Gen., Lawrence M. Henry, U. S. Atty., Morton Hollander and Harland F. Leathers, Dept. of Justice, were with him on the brief), for appellees.

Before LEWIS, BREITENSTEIN and HICKEY, Circuit Judges.

PER CURIAM.

This appeal is taken from a judgment of the District Court for the District of Colorado denying to appellant declaratory and injunctive relief and relief by writ of mandamus or habeas corpus in appellant's efforts to establish his present status as a conscientious objector and require the United States Air Force to assign him to duty consistent with appellant's subjective conscience or to accept his resignation as a commissioned officer. Appellant has served as a regularly commissioned officer for over eleven years and his sincerity in advancing his present contentions is not questioned for the purposes of this case. In brief summary, appellant asserts that since the initiation of his voluntary military service he has become a conscientious objector to wars of aggression, particularly to the Vietnam conflict, that he is about to be assigned duty inconsistent with his conscience in such regard, that he has exhausted his administrative remedies, and that, absent judicial shelter at this time, he will be forced by his beliefs to disobey a military order and thus be faced with a court-martial proceeding. The full factual background of the case is set forth in the comprehensive memorandum opinion and order of the trial court, 267 F. Supp. 701. We affirm the judgment for the reasons set forth in the trial court's opinion and adopt his opinion as the opinion of this court, adding only a few comments pertinent to the appellate presentation urged by counsel.

The trial court dismissed appellant's action for lack of jurisdiction and we agree. Although appellant has exhausted his administrative remedies as that term is concerned with Air Force regulations, he has not exhausted

the military process and has not been denied, nor can we anticipate that he will be denied, a full consideration of his constitutional rights within the complete scope of that process. Nor can we at this time give heed to appellant's claim that applicable Air Force regulations pertaining to treatment of in-service personnel do not meet the classical requirements of due process as that concept applies to administrative bodies in general. Military regulations must be considered in the light of military exigencies, "must be geared to meet the imperative needs of mobilization and national vigilance—when there is no time for 'litigious interruption'"[1] and great and wide discretion exists in the executive department both in the formation and application of regulations and in their interpretation in such matters as what constitutes "for the good of the service." And, finally, we cannot review the merits of appellant's present claim that the Air Force in the case at bar did not comply with its own regulations in regard to appellant. Such a claim must indeed be strained to contain an overtone of constitutional invalidity giving rise to immediate judicial review of its application.

Appellant asserts that under the principles announced in Dombrowski v. Pfister, 380 U. S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22, he is entitled to injunctive relief to assure determination of his First Amendment right to religious freedom without exposure to court-martial proceedings. We are unwilling to expand the Dombrowski doctrine to enjoin the military actions here under consideration. To do so would run contrary to established law.[2]

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[1] United States v. Nugent, 346 U. S. 1, 10, 73 S. Ct. 991, 996, 97 L. Ed. 1417.

[2] See Wales v. Whitney, 114 U. S. 564, 5 S. Ct. 1050, 29 L. Ed. 277; Gusik v. Schilder, 340 U. S. 128, 71 S. Ct. 149, 95 L. Ed. 146;

The essence of appellant's claim is that the federal judiciary should review and determine the validity of military assignments to duty. This we cannot do.[3]

In order to allow appellant opportunity to pursue his asserted remedies further, the restraining order heretofore issued by this court shall continue in effect for ten days after the filing of this opinion. Thereupon the restraining order shall be dissolved without further order and the mandate shall issue forthwith.

Beard v. Stahr, 370 U. S. 41, 82 S. Ct. 1105, 8 L. Ed. 2d 321; and Gorko v. Commanding Officer, 10 Cir., 314 F. 2d 858.

[3] Orloff v. Willoughby, 345 U. S. 83, 94, 73 S. Ct. 534, 97 L. Ed. 842. See also Reid v. Covert, 354 U. S. 1, 39, 77 S. Ct. 1222, 1 L. Ed. 2d 1148; Burns v. Wilson, 346 U. S. 137, 140, 73 S. Ct. 1045, 97 L. Ed. 1508; Reaves v. Ainsworth, 219 U. S. 296, 306, 31 S. Ct. 230, 55 L. Ed. 225; and Luftig v. McNamara, D. C. Cir. 373 F. 2d 664, 665.

AIR FORCE REGULATION
NO. 35-24

DEPARTMENT OF THE AIR FORCE
Washington, 8 March 1963

Military Personnel

DISPOSITION OF CONSCIENTIOUS OBJECTORS

This regulation establishes uniform procedures for the utilization, assignment, and consideration of requests for separation of conscientious objectors. It implements DOD Directive 1300.6, 21 August 1962.

	Paragraph
SECTION A—GENERAL INFORMATION AND POLICY	
To Whom This Regulation Applies	1
Air Force Policy	2
Criteria for Disposition of the Member	3
Individual Consideration	4
Basis for Disciplinary Action	5
SECTION B—PROCESSING REQUESTS FOR SEPARATION	
How Cases Will Be Documented and Forwarded	6
Status of Member Whose Request for Separation is Under Consideration	7
Action by Headquarters USAF	8
Notifying Selective Service Regarding a Member Who Has Not Completed 180 Days' Active Duty	9
Exceptions	10
Disposition of Correspondence	11

SECTION A—GENERAL INFORMATION AND POLICY

1. To Whom This Regulation Applies. This regulation applies to all members of the Air Force. Members of the Reserve components not serving on extended active duty, who fall within the criteria stated in this regulation, will be processed under the specific regulation pertaining to their respective components. This regulation will not be cited as an authority for separation or assignment.

2. Air Force Policy:

a. *Appointment or Enlistment of Conscientious Objectors.* The Air Force does not accept individuals (other than physicians or dentists) who claim conscientious objection to military service for appointment as officers or for enlistment in the active force or the Reserve forces. Cases may arise, however, in which individual members profess a conscientious objection after entering military service.

b. *Recognition of Conscientious Objection.* The fact of conscientious objection does not exempt men from the draft. However, the Congress has deemed it more essential to respect an individual's religious beliefs than to force him to serve in the Armed Forces. Accordingly, bona fide religious objection to participation in war, in any form, has been recognized to the extent that such an objector is not inducted into the Armed Forces but is required to serve his country for the same period of time in civilian work contributing to the maintenance of national health, safety, or interest. Consistent with this national policy, bona fide conscientious objection by a member of the Air Force will be recognized to the extent practicable and equitable.

c. *Claim to Exception From Military Service.* Federal courts have held that a claim to exemption from military service under the Universal Military Training and Service Act must be interposed prior to notice of induction. Failure to make timely claim for exemption constitutes a waiver of the right to claim. Therefore, the Air Force cannot entertain a request for separation based solely on conscientious objection:

(1) Which existed but was not claimed before entry on active duty or enlistment.

(2) Which was claimed, and denied by Selective Service, before entry into military service.

d. *Separation.* No vested right exists for any individual to be separated from military service at his own request before the expiration of his term of service, whether he is serving voluntarily

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This regulation supersedes AFR 39-51, 14 August 1951.

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or involuntarily. Administrative separation before completion of the term of service is discretionary with the Secretary of the Air Force, on the basis of judgment of the facts and circumstances in the case. The Air Force normally will separate members for whom a classification as conscientious objector is recommended (see paragraph 3b), except that a member for whom a 1–A–O classification is recommended will not be separated until he has completed two years of active service (see paragraph 8a(2)).

e. *Utilization and Assignment:*

(1) Individuals inducted into military service, who have previously been classified as 1–A–O by local induction boards, are assigned to noncombatant service. This service, in accordance with the President's Executive Order 10028, 13 January 1949, is defined as:

(a) Service in any unit of the Armed Forces which is unarmed at all times;

(b) Service in the medical department of any of the Armed Forces, wherever performed; or

(c) Any other assignment the primary function of which does not require the use of arms in combat provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use. (The term "noncombatant training" shall mean any training which is not concerned with the study, use, or handling of arms or weapons.)

(2) Consistent with the above, members for whom a 1–A–O classification is recommended and who have less than 2 years of active service will be assigned to noncombatant service until completion of 2 years of active duty.

(3) Members of the Air Force assigned to noncombatant service will not be allowed to avoid the important or hazardous duties which are the responsibility of all members of the military organization to which they are assigned.

3. Criteria for Disposition of the Member:

a. *General.* In evaluating a request for separation based on conscientious objection, great care must be exercised to insure the sincerity of the claim. It is essential that procedures not invite or permit abuse by unscrupulous persons who seek to avoid all obligations on the grounds of religious belief. Claims of conscientious objection by all persons, whether existing before or after entering military service, should be judged by the same standards.

b. *Selective Service System Standards.* The standards used by the Selective Service System in determining 1–O or 1–A–O classification of draft registrants before induction are appropriate for application to Air Force personnel who claim conscientious objection after entering military service.

(1) The "1–O classification" does not permit induction into military service but does permit induction into the Alternate Service Plan (Conscientious Objectors' Work Program).

(2) The "1–A–O classification" permits induction into the military service and the inductee is required to perform noncombatant duties.

(3) Either classification requires the individual to fulfill his obligations under the UMT&S Act.

c. *Criteria For Determining Conscientious Objection:*

(1) The criteria for determining conscientious objection (other than the statutory requirement that the objection be religious, as opposed to personal or philosophical) are not absolute objective measurements which can be applied across the board. They are the result of extensive experience and practices which have been upheld in the courts in connection with legal obligations for service. Among the factors to be considered are the individual's:

(a) Membership in a peace church.

(b) Training in home and church.

(c) General demeanor and pattern of conduct.

(d) Employment in defense-connected activities.

(e) Participation in religious activities.

(f) Credibility (and that of persons supporting his claim).

Note: If a member is not liable for induction into the Alternate Service Plan of Selective Service after separation, because of having served 180 days or more, his willingness to engage voluntarily in post-military work of the nature encompassed by the Plan may also be pertinent.

(2) *Church Membership and Church Tenets.* While church membership and church tenets are relevant in determining conscientious objection, they are not compelling. The courts have held that mere membership in a religious group teaching conscientious objection is not an automatic basis for classification as a conscientious objector; nor does membership in a group which does not require conscientious objection constitute an automatic basis for denying such classification. The law does not require affiliation with any particular group in order that an individual may be classified as a conscientious objector.

d. *Objective Consideration.* The evaluation of the sincerity of a claim of conscientious objection

requires objective consideration of professed belief not generally shared by persons in the military service. For that reason, particular care must be exercised not to deny bona fide convictions solely on the basis that the professed belief is incompatible with one's own.

4. Individual Consideration. Each request for separation based on conscientious objection will be handled individually, in accordance with the facts and special circumstances of the case, and the criteria set forth in this regulation. Headquarters USAF will determine final action to be taken.

5. Basis for Disciplinary Action. If, in the judgment of the commander concerned, any individual reassigned to noncombatant duties or returned to his normal duty assignment demonstrates or has previously demonstrated his inability or unwillingness to cooperate in a manner which constitutes the basis for disciplinary action, action will be taken as in the case of any other member of the Air Force who demonstrates similar behavior.

SECTION B—PROCESSING REQUESTS FOR SEPARATION

6. How Cases Will Be Documented and Forwarded:

a. *Submission of Request for Separation.* An officer or an airman who professes to be a conscientious objector may submit a resignation or application for separation to his immediate commander. The commander will forward the case in accordance with the regulation under which submitted, to Hq USAF (AF PMPKA) for final determination. Each forwarding indorsement will include a recommendation of approval or disapproval of the request, with a statement of the reasons therefor. Each echelon of command will forward the case as rapidly as possible, and always within 5 workdays.

(1) An officer may tender his resignation in accordance with paragraph 16, AFR 36–12, 1 July 1960, as amended.

(2) An airman may apply for discharge in accordance with paragraph 3p, AFR 39–14, 1 March 1960, as amended.

(3) A member of a Reserve component may tender his resignation or apply for discharge in accordance with AFRs 45–42 or 45–43, as appropriate.

b. *Documentation Required.* In addition to the documentation required by a(1), (2) and (3) above, each case will include:

(1) Information sheet as outlined in attachment 1, which will be completed by the member requesting separation.

(2) Statement of member as required by c(2) below.

(3) Statement from the base chaplain concerning the case.

c. *Initial Action Upon Receipt of Request For Separation.* Upon receipt of a request for separation, the immediate commander will:

(1) Request a legal officer, or the base personnel officer if a legal officer is not available, to counsel the member concerning the provisions of this regulation, and of Section 3103, Title 38, United States Code. That section provides, in pertinent part, that the separation of any person on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority shall bar such person's rights (except Government insurance) under laws administered by the Veterans' Administration based upon the period of service from which discharged or dismissed. The only exception is in cases in which it is established, to the satisfaction of the Administrator, that the member was insane.

(2) After counseling, require the member to sign and date the statement as outlined in attachment 2.

7. Status of Member Whose Request for Separation is Under Consideration. Pending final decision on the case, the member will be assigned duties providing the minimum conflict with his professed beliefs. In this connection, remember that conscientious objection is based upon religious belief. Military personnel who observe Sabbath (from sunset Friday to sunset Saturday) as their regular day of worship rather than Sunday, and whose high holy days fall on weekdays, will be excused from duty to attend their religious services locally if the military situation permits (see AFR 265–1). The member will, nevertheless, be required to maintain the same standards of performance and behavior as other personnel assigned to his unit.

8. Action by Headquarters USAF:

a. *Forwarding Cases to Selective Service.* If a member has less than 2 years' active service, Hq USAF (AF PMPKA) will forward each such case to the Director, Selective Service System, Washington 25, D. C., prior to making a final determination on the case, requesting an advisory opinion as to the member's proper classification under the UMT&S Act. (An advisory opinion

may also be sought from Selective Service on a member with 2 or more years of service.)

(1) A member for whom 1–O classification is recommended by Selective Service will be considered for discharge by reason of his conscientious objection to military service.

(2) A member for whom 1–A–O classification is recommended by Selective Service normally will not be separated if he has less than 2 years' service but will be reassigned to noncombatant duties. An individual so reassigned will be required to sign and date a statement as indicated in attachment 3. Upon completion of 2 years' service he will, if he has a Reserve obligation remaining, be released from active duty and transferred to the Air Force Reserve for completion of his military service obligation under the UMT&S Act.

(3) A member for whom neither 1–O nor 1–A–O classification is recommended by Selective Service will normally be retained in military service, subject to normal duty assignments.

b. *Record of Entry To Be Made.* When a member is separated as a conscientious objector, items 11c and 32, DD Form 214, "Armed Forces of the United States Report of Transfer or Discharge," will be completed as follows:

(1) *Item 11c:*

(a) *Officers*—(SDN 51Q) (citation of instrument directing separation), Conscientious Objection, AFR 36–12.

(b) *Airmen*—(SDN 318) (citation of instrument directing separation), Conscientious Objection, AFR 39–14.

(2) *Item 32:* "Paragraph 11, AFM 39–9, 2 May 1960, as amended, applies."

c. *Character of Separation.* If separation is warranted, the character of separation to be awarded will be determined by the member's military record, the standards established in AFRs 36–12 or 39–10, as appropriate, and the procedural guidelines set forth in this regulation.

9. Notifying Selective Service Regarding a Member Who Has Not Completed 180 Days' Active Duty. Personnel with less than 180 days' service (volunteers or inductees) who are determined to be bone fide conscientious objectors (1–O classification), and whose request for separation is made early enough so that separation occurs prior to completion of 180 days' active duty, will be separated for the convenience of the Government by reason of conscientious objection to permit service in the Conscientious Objectors' Work Program. In such cases, the immediate commander will notify the Selective Service System promptly of the date of separation from military service and the fact that the individual has not completed 180 days' active duty. He will request the Selective Service System to "induct" the individual for the alternate service provided by the UMT&S Act.

10. Exceptions. When an individual who would normally be recommended for a 1–A–O classification has extensive service or there are other unusual circumstances warranting such action, the Secretary of the Air Force may retain the individual in service and direct his reassignment to noncombatant duties. Requests for exception, fully documented, may be forwarded through channels to Hq USAF (AF PMPKA).

11. Disposition of Correspondence. After final action has been taken, the immediate commander will dispose of all correspondence in accordance with AFM 35–9 or AFM 35–12, as appropriate.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

CURTIS E. LeMAY
Chief of Staff

OFFICIAL

R. J. PUGH
Colonel, USAF
Director of Administrative Services

3 Attachments.
1. Required-Information Sheet
2. Statement of Member (Separation)
3. Statement of Member (Reassignment)

REQUIRED-INFORMATION SHEET

Each person who requests separation from the Air Force as a conscientious objector will provide the information indicated below. (The individual may submit other information if he wishes.)

1. Current Information. State your:

a. Full name.

b. AFSN.

c. Selective Service Number.

d. Military address.

e. Permanent home address.

2. General Information. State:

a. Name and address of each school and college you attended, the type of school (public, church, military, commercial, etc.), and dates of attendance.

b. Chronologically all your occupations, positions, or jobs, other than as a student in school or college, in which engaged at any time, whether or not for monetary compensation; include type of work, name and address of employer, and the from/to date for each occupation, position, or job.

c. Addresses and dates of all your former residences.

d. Names and addresses of your parents if living; and indicate whether living or deceased.

e. Each parent's religious denomination or sect.

3. Military Status:

a. Did you apply to the Selective Service System (local board) for classification as a conscientious objector before your entry into the Air Force? If so, to which local board? What was the board's decision (if known)?

b. If you have served less than 180 days in the military service, and are discharged as a conscientious objector, are you willing to perform work under the Selective Service Conscientious Objectors' Work Program? Yes _____ No _____ Will you consent to your local Selective Service board's issuing an order for such work? Yes _____ No. _____

4. Religious Training and Belief:

a. Do you believe in a Supreme Being?

b. Describe the nature of the belief which is the basis of your claim; and state whether or not your belief in a Supreme Being involves duties which to you are superior to those arising from any human relation.

c. Explain how, when, and from whom or what source you received the training and acquired the belief which is the basis of your claim.

d. Give the name and present address of the individual upon whom you rely most for religious guidance.

e. Under what circumstances, if any, do you believe in the use of force?

f. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrates the consistency and depth of your religious convictions.

g. Have you ever given public expression, written or oral, to the views you have expressed herein as the basis of your claim? If so, specify when and where.

5. Participation in Organizations:

a. *Military.* Have you ever been a member of any military organization or establishment before entering the Air Force for this tour? If so, state its name and address, and the reasons why you became a member.

b. *Religious.* Are you a member of a religious sect or organization? If "yes":

(1) State the name of the sect, and the name and location of its governing body or head if known to you.

(2) When, where, and how did you become a member of said sect or organization?

(3) State the name and location of the church, congregation, or meeting you customarily attend.

(4) Give the pastor's or leader's name, title, and present address.

(5) Describe carefully the creed or official statement of your religious sect or organization relative to participation in war.

c. *Other.* Describe your relationships with and activities in all organizations with which you have been affiliated, other than military, political, or labor organizations.

6. References. Give the name, full address, occupation or position, and relationship to you, of persons who can supply information as to the sincerity of your professed convictions against participation in war.

Attachment 1

STATEMENT OF MEMBER

(Separation)

1. I have been counselled concerning possible non-entitlement to benefits administered by the Veterans' Administration due to discharge from the Air Force as a conscientious objector.

2. I understand that a discharge as a conscientious objector, who refuses to perform satisfactory military duty or otherwise to comply with lawful orders of competent military authority, may bar all rights, based upon the period of service from which discharged, under laws administered by the Veterans' Administration except my legal entitlement (if any) to any war risk, Government (converted) or National Service Life Insurance.

(Date) _____ (Signature of Member) _____

(Typed Name, AFSN, Grade, USAF)

The preceding statement of (member's name) was signed by him after he had been counselled by me.

(Date) _____ (Signature of Officer Who Counselled Member) _____

(Typed Name, AFSN, Grade, USAF)

Attachment 2

STATEMENT OF MEMBER

(Reassignment)

1. I have been counselled concerning designation as a conscientious objector. On the basis of my religious belief, I consider myself to be a conscientious objector and am conscientiously opposed to participation in combatant training and service.

2. I request assignment to noncombatant duties for the remainder of my current term of service and/or military obligation.

3. I fully understand that on expiration of my current term of service I am not eligible for voluntary enlistment, reenlistment, or voluntary recall to active service in the Air Force.

(Date) _____

(Signature of Member) _____

(Typed Name, AFSN, Grade, USAF)

Attachment 3

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 722

CAPTAIN DALE E. NOYD, FR 28084,
Petitioner,

v.

HONORABLE ROBERT S. McNAMARA,
Secretary of Defense, *et al.*

BRIEF OF *AMICUS CURIAE* AMERICAN HUMANIST ASSOCIATION IN SUPPORT OF A PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX.

	PAGE
Interest of *Amicus*	1
Consent of the Parties	2
Opinions Below	2
Jurisdiction	3
Statement of Questions Presented	3
Constitutional and Statutory Provisions and Air Force Regulations Involved	4
Statement of the Case	4
Reasons for Granting the Writ	7
I. The denial of Petitioner's application for conscientious objector status because of his selective opposition to war interferes with the free exercise of his religion, wrongly discriminates against him, and is contrary to a reasonable interpretation of the statute: because of the recurring and widespread incidence of this problem, this Court should grant certiorari	7
A. Petitioner's application for conscientious objector status under AFR 35-24 was denied solely because he is not opposed to participation in all wars, for neither the religious basis for his belief nor his sincerity are disputed, and no other reason for rejection appears	7
1. Petitioner's beliefs are religious in character	7
2. Petitioner's sincerity is undisputed	9
B. This Court should review and reverse the denial of conscientious objector status because this denial (1) unjustifiably interferes with the free exercise of his religion; and (2) wrongly discriminates against him because of his particular content of his religious convictions	10

PAGE

1. The refusal unjustifiably interferes with Petitioner's free exercise of his religion by preventing him from acting in accordance with the religiously-based conscientious objection to participation in this war 10

a. The religious conscience and selective opposition 10

b. Permitting selective opposition will not impugn the integrity of the governmental process 12

c. Permitting selective opposition will not interfere with necessary governmental functions 14

d. The importance of respecting conscience 15

2. The refusal to honor the conscientious objections of Petitioner's religiously based selective pacifism discriminates against Petitioner's religious beliefs .. 16

C. The issue is appropriate for determination at this time because the ambiguity of the statute and regulations has produced uncertainty and conflicting decisions which have caused and will cause serious harm .. 17

1. The problem is important and recurring 17

2. The statute and regulations are ambiguous and the decisions are conflicting with most having been wrongly decided 17

II. The courts below erroneously dismissed Petitioner's *habeas corpus* proceeding on the ground that he had failed to exhaust his remedies within the military service 22

A. The doctrine of exhaustion of remedies is inapplicable to the circumstances of this case 22

B. Under well established authority, Federal Courts have jurisdiction to adjudicate in

PAGE

Petitioner's present *habeas corpus* proceeding the lawfulness of the refusal of the Department of the Air Froce to discharge Petitioner or to assign him non-combatant training and service 24

C. Petitioner has properly invoked such jurisdiction 29

Conclusion 30

TABLE OF CASES.

Bolling v. Sharpe, 347 U. S. 497 (1954) 16
Brown v. McNamara, 263 F. Supp. 686 (D. N. J. 1967). 28
Burns v. Wilson, 346 U. S. 137, 139 (1953) 25
Chavez v. Fergusson, 266 F. Supp. 879 (N. D. Cal. 1967) 28
Dickens v. Hunter, 10 Cir. 1950, 179 F. 2d 784 24
Dickinson v. United States, 346 U. S. 389 (1954) . . 10, 14, 28
Estep v. U. S., 327 U. S. 114, 123-4, 140 (1946) 25
Fleming v. United States, 344 F. 2d 912, 915-16 (10th Cir. 1965) 9, 10, 18
Gorko v. Commanding Officer, 10 Cir. 1963, 314 F. 2d 858 24
Gurik v. Schilder, 340 U. S. 128 (1950) 23
Harmon v. Brucker, 355 U. S. 579, 481-82 (1958) 29
Hunter v. Beets, 10 Cir. 1950, 180 F. 2d 101, *cert. denied* 339 U. S. 963 24
Jessen v. United States, 212 F. 2d 897 (10th Cir. 1954). 10
Kretchet v. United States, 284 F. 2d 561 (9th Cir. 1960) 11, 18
McKinney v. Finletter, 10 Cir. 1953, 205 F. 2d 761 ... 24
McMahan v. Hunter, 10 Cir. 1950, 179 F. 2d 661, *cert. denied* 339 U. S. 968 24
Orloff v. Willoughby, 345 U. S. 83 (1953) . . 24, 25, 26, 28, 29
Reck v. Hunter, 10 Cir. 1950, 179 F. 2d 784 24
Rempel v. United States, 220 F. 2d 949 (10th Cir. 1955) 10
Sherbert v. Verner, 374 U. S. 398, 404 (1963) 16
Sicurella v. United States, 348 U. S. 485 (1954) . . . 11, 17, 18
Simmons v. Hunter, 10 Cir. 1960, 179 F. 2d 664, *cert. denied* 339 U. S. 968 24
Spencer v. Hunter, 10 Cir. 1949, 177 F. 2d 370, *cert. denied* 344 U. S. 869 24

PAGE

Taffs v. United States, 208 F. 2d 329, 331 (8th Cir. 1953), *cert. denied*, 74 Sup. Ct. 532 (1954) 19
Torcaso v. Watkins, 367 U. S. 488, 495 (1961) 16
United States v. Close, 215 F. 2d 439, 442 (7th Cir. 1954) 19
United States v. Fleming, 344 F. 2d 916 13
United States v. Hartman, 209 F. 2d 366, 371 (2d Cir. 1954) 19
United States v. Kauten, 133 F. 2d 703 (2d Cir. 1943) .. 18
United States v. Kurki, 255 F. Supp. 161 (E. D. Wis. 1966) 18, 19
United States v. MacIntosh, 283 U. S. 605, 627 (1931) . 11, 13, 14, 15, 21
United States v. Schwimmer, 279 U. S. 644, 659 (1929) . 14
United States v. Seeger, 380 U. S. 163 (1965) 7, 8, 9, 15, 19, 21
U. S. *ex rel.* Phillips v. Downer, 135 F. 2d 521, 524 (2d Cir. 1943) 18
Wales v. Whitney 23
Witmer v. United States, 348 U. S. 379, 381 (1955) .. 25, 28

STATUTES.

All Writs Statute, 28 U. S. C. § 1651(a) 6
Universal Military Training and Service Act, 50 U. S. C. § 456(j), § 6(j) 3, 4, 17, 19, 21, 25, 27, 28, 29
28 U. S. C. § 1254(1) 3
10 U. S. C. § 871 24
5 U. S. C. 171a(2) 27
5 U. S. C. § 171(c)(7) 27

REGULATIONS.

Air Force Regulation:
AFR 35-24 ..... 3, 4, 5, 7, 17, 20, 21, 26, 29
AFR 36-12 5

MISCELLANEOUS.

Department of Defense Directive 1300.6, III.F 29
Note, The Conscientious Objector and the First Amendment:
34 U. Chi. L. Rev. 79, 102 (1966) 12
34 Chi. L. Rev. at 103-04 14

PAGE

Sibley & Jacob, Conscription of Conscience 16
1940-47 25 (1952) 11
461 14
475-78 14
69 17
Stone, The Conscientious Objector, 21 Colum. U. Q. 253, 269 (1919) 15

Supreme Court of the United States

October Term, 1967

No. .....

CAPTAIN DALE E. NOYD, FR 28084,
Petitioner,

v.

HONORABLE ROBERT S. McNAMARA,
Secretary of Defense, *et al.*

BRIEF OF *AMICUS CURIAE* AMERICAN HUMANIST ASSOCIATION IN SUPPORT OF A PETITON FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on May 16, 1967, and *Amicus Curiae* supports this petition.

Interest of *Amicus*

The American Humanist Association is an organization of individuals who believe that for man to realize his potential he must apply reason and the principles of science to the solution of his personal and social problems. Humanists believe that mankind has only itself to rely upon and only this life with which to be concerned. Therefore, humanists would agree with the philosopher, Albert Camus, that:

> If there is a sin against life, it consists perhaps, not so much in despairing of life as in hoping for another life and in eluding the implacable grandeur of this life (The Myth of Sisyphus).

This interest in improving our present life has led humanists to be concerned about world peace. Many humanists, though by no means all, have reached the conclusion that any war and the participation in any armed conflict is morally unjustifiable. Others have concluded that only wars of aggression must be opposed. The American Humanist Association believes that both are equally entitled to exemption and therefore requests permission to file this brief as *Amicus Curiae* in support of the petition for certiorari of one who opposes only certain wars.

Consent of the Parties

Permission to file this brief has been granted by both the Solicitor General of the United States and by counsel for the petitioner, and the consents have been filed with the Clerk of the Court by letter dated October 12, 1967.

Opinions Below

The March 29, 1967 opinion of the United States District Court for the District of Colorado, Hon. William E. Doyle, U. S. D. J., granting, in part, petitioner's motion for a preliminary injunction is printed in the Appendix to the petition.* The April 25, 1967 opinion of the District Court, per Judge Doyle, after trial, dismissing the complaint on jurisdictional grounds, is reported at 267 F. Supp. 701. The *Per Curiam* opinion of the Court of Appeals for the Tenth Circuit, affirming the District Court, is reported at 378 F. 2d 538 (1967).

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* References to material printed in the Appendix to the Petition will hereinafter appear as "App. —"

Jurisdiction

The judgment of the Court of Appeals was entered on May 16, 1967. On August 10, 1967, Mr. Justice Fortas issued an order extending the time in which to file this petition for a writ of certiorari up to and including September 13, 1967, and on September 13, 1967, Mr. Justice Fortas further extended such time up to and including October 13, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Statement of Questions Presented

1. Does denying petitioner conscientious objector status because of his selective opposition to war interfere with the free exercise of his religion? Does such a denial wrongly discriminate against his religious beliefs?

2. Do the pertinent Air Force Regulation, AFR 35-24, and its statutory basis, § 6(j) of the Universal Military Training and Service Act, 50 U. S. C. § 456(j), authorize the grant of conscientious objector status to one whose particular religious beliefs lead him to oppose only certain wars?

3. Where petitioner has fully satisfied all pertinent administrative procedures for raising the issue, is he also required to provoke a court martial and a potential criminal penalty before the civilian court will consider the legal issue involved?

4. Is *habeas corpus* an appropriate procedure for raising this issue of law?

Constitutional and Statutory Provisions and Air Force Regulations Involved

This case involves the due process clause of the Fifth Amendment and the religious liberty and establishment of religion clauses of the First Amendment.

The statute most closely involved is that which expresses national policy on conscientious objection to participation in military service, Section 6(j) of the Universal Military Training and Service Act of 1950, as amended, 50 App. U. S. C. § 456(j).

Many provisions of Air Force Regulations are involved. The principal regulation is AFR 35-24, entitled "disposition of Conscientious Objectors" and is set forth in full in the Appendix to the petition, App. 23a.

Statement of the Case

Petitioner is an Air Force Captain who became "a conscientious objector to wars of aggression, particularly to the Vietnam conflict," 378 F. 2d at 538, after 11 years of honorable service, while he was assigned as Assistant Professor of Psychology at the Air Force Academy. Petitioner's conscientious beliefs were set forth in detail in the complaint, and Exhibits A to K attached thereto (R. 29-76),* all of which were received in evidence and were the subject of considerable testimony in the proceedings below. They were perhaps best summarized by District Judge Doyle in his opinion of March 29, 1967, as follows:

> "* * * he holds a philosophy which he declares as 'ethical humanism' which dictates these scruples against war * * * he does not object to all war * * * he objects rather to particular wars of aggression, but specifically to the Vietnam War and that he would not be a conscientious objector if it were a matter of defending

* References to the transcript of the record will appear as "R. ——".

> the United States. He doesn't rule out the possibility that he would go to foreign countries first in order to carry out an assignment of defending the United States" (App. 1a).

Petitioner made application under appropriate regulations for resignation from the Air Force, both in the best interests of the Air Force under Air Force Regulation (hereinafter "AFR") 36-12, and on specific grounds of conscientious objection under AFR 35-24 (App. 23a). Both applications, as well as the text of AFR 35-24, were attached as Exhibits A, B and C to the complaint. The applications specified that petitioner sought either acceptance of his resignation, or reassignment to duties not in conflict with his conscientious position. Both applications were denied and petitioner, a former fighter pilot, received orders assigning him to the 27th Tactical Fighter Wing, Cannon Air Force Base, New Mexico, for upgrade training in F-100 jet fighter aircraft. "This aircraft is currently being used in Vietnam, and the probability is strong that anyone receiving training at Cannon can anticipate transfer to the combat zone" (267 F. Supp. at 705).

Prior to the effective date of such transfer order, April 1, 1967, petitioner and his counsel made various attempts to confer with superior military and civilian Air Force officials for the purpose of obtaining a reassignment which would not be in conflict with his conscience and which would thereby preclude this litigation. All of these futile efforts were set forth in detail in the complaint.

On March 27, 1967 this action was instituted in the United States District Court for the District of Colorado, seeking declaratory judgment, injunctive relief, relief in the nature of *habeas corpus,* and ancillary relief. Capt. Noyd argued, *inter alia,* that his application for recognition as a conscientious objector, and either separation or appro-

priate reassignment, were improperly and discriminatorily denied by the Air Force, in violation of his constitutional rights and relevant statutes and regulations.

On March 27th, simultaneously with the filing of the complaint, a motion was made seeking preliminary injunctive relief; specifically, that respondents should be restrained from executing their anticipated order of assigning petitioner to fly fighter aircraft in Vietnam, or to train therefor, or to other duty in conflict with his conscience, prior to the determination of this action by the Court.

After a hearing, the Court concluded that it did not have jurisdiction of the cause, essentially for lack of exhaustion of military remedies, and denied the petition. Notice of appeal was timely filed in the Court of Appeals for the Tenth Circuit, and a stay was granted pending appeal, pursuant to the All Writs Statute, 28 U. S. C. § 1651(a), over the respondents' objections. Submission of briefs and oral argument were accelerated, and on May 16, 1967 the Court of Appeals affirmed the District Court, 378 F. 2d 538 (App. 19a), but continued the stay for a period of ten days to allow time for a stay application pending certiorari to be made to this Court. An application for a stay of the mandate of the Tenth Circuit was timely presented to Mr. Justice White, as Circuit Justice for the Tenth Circuit, and denied on June 2, 1967.

Subsequently, petitioner was transferred to Cannon Air Force Base. In a further attempt to exhaust every conceivable Air Force administrative remedy, he submitted, on June 19, 1967 a new application for resignation or reassignment as a conscientious objector, and attached thereto, as further evidence of his religious beliefs, and the sincerity with which he held them, the transcript of the testi-

mony heard in the District Court. This petition was denied on August 21, 1967, and petitioner was ordered to F-100 recurrency training and upgrade training as an instructor pilot. This training is now continuing.

Reasons for Granting the Writ

I. The denial of petitioner's application for conscientious objector status because of his selective opposition to war interferes with the free exercise of his religion, wrongly discriminates against him, and is contrary to a reasonable interpretation of the statute: because of the recurring and widespread incidence of this problem, this Court should grant certiorari.

A. Petitioner's application for conscientious objector status under AFR 35-24 was denied solely because he is not opposed to participation in all wars, for neither the religious basis for his belief nor his sincerity are disputed, and no other reason for rejection appears.

1. Petitioner's beliefs are religious in character.

As the March 29, 1967 opinion of the District Court makes clear, see Appendix to Petition 1a. Petitioner is a humanist, who is unwilling to participate in what he considers wars of aggression, though he has no objection to fighting in defense of the United States (Record 576). The basis of his belief is clearly religious under the standards of *United States v. Seeger*, 380 U. S. 163 (1965). Thus, in his application for conscientious objector status Petitioner described his belief as follows:

> If the definition of "Supreme Being" is limited to include only the traditional Christian concept of a personalistic, anthropomorphic, and omnipotent supernatural-creator-object-being whom I worship and upon whom I depend for salvation or a meaning for my life, then I do not believe in such an object-being • • •

> If, however, the definition is to include the "God beyond God" of the "ground of Being" of Paul Tillich; the "existential Being" of Martin Buber; or "* * * the perfect pattern, envisioned by faith, of humanity as it should be * * *" of David Muzzey; then I believe in a Supreme Being. The "god" in which I believe transcends the traditional Christian God and yet does not transcend human experience and faith built upon that experience; it is an ultimate concern for man, his purpose, and his possibilities. Part of the essence of that in which I believe is captured by Tillich: "'God' is the answer to the question implied in man's finitude; he is the name for that which concerns man ultimately. This does not mean that first there is a being called God and then the demand that man should be ultimately concerned about him. It means that whatever concerns a man ultimately becomes god for him * * *"

Directly quoting Dr. David S. Muzzey's statement, as quoted in *Seeger,* Petitioner added:

> Instead of positing a personal God, whose existence man can neither prove nor disprove, the ethical concept is founded on human experience. It is anthropocentric, not theocentric. Religion, for all the various definitions that have been given it, must surely mean the devotion of man to the highest ideal that he can conceive. And that ideal is a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to cultivate the best in their fellow men. What ultimate reality is we do not know; but we have the faith that it expresses itself in the human world as the power which inspires in men moral purpose * * *

And all the expert witnesses agreed that Petitioner's views were religious (R. 482, 496, 511, 527), even though some disagreed with his position on the Vietnam conflict (R. 484, 499). Thus, Dr. Robert C. Kimball, the literary executor for Paul Tillich, declared that "definitely, in this sense of Tillich's that religion is ultimate concern— Captain Noyd comes off as a very religious person" (R. 511).

The fact that Petitioner's beliefs are partly derived from and touch upon grounds which orthodox religious people might consider secular, *e. g.*, the thinking of Erich Fromm, Camus, Dewey and others, does not militate against their essentially religious nature, as was clearly recognized in *Fleming v. United States*, 344 F. 2d 912, 915-16 (10th Cir. 1965), relying on *Seeger*, 380 U. S. at 186. As our religious organizations became more involved in social problems, a rigid separation between religious and social thought becomes ever more unrealisitic. The fact that Petitioner's belief involves selective opposition to war is equally irrelevant to its religious character, for numerous religious groups have taken and are now taking a similar selective position (R. 500-02, 517-19, 534-46). Indeed, the total pacifists are a very small minority among religious groups (R. 546).

2. PETITIONER'S SINCERITY IS UNDISPUTED.

Petitioner's sincerity is equally clear, and is not really questioned in this case. See Decision of Court of Appeals, 1st para. There is also a vast amount of evidence in the record of this proceeding attesting to his sincerity. For example, Petitioner's base Chaplain, Captain Donald B. Clapp, who met with the petitioner two or three times a week for some months described him as "totally and thoroughly sincere * * *" "display[ing] to me as much, if not more, personal integrity than any human being that I have ever met." (R. 418, 478), though Captain Clapp himself did not agree with Petitioner's views on Vietnam. The Chaplain reported also that the Senior Protestant base chaplain had written that "this officer is completely honest and sincere in taking the action he has taken. He is deeply concerned with his own integrity and that of our nation." There is nothing in the record to cast any doubt on this

unanimously held judgment, and under *Dickinson v. United States*, 346 U. S. 389 (1954), there would be no basis for a contrary finding. See also *Fleming v. United States*, 344 F. 2d 912, 915 (10th Cir. 1965); *Rempel v. United States*, 220 F. 2d 949 (10th Cir. 1955); *Jessen v. United States*, 212 F. 2d 897 (10th Cir. 1954).

Thus, there can be and was only one basis for denying conscientious objector status to Petitioner and that was his opposition to any war except in defense of his country. Indeed, the Government admitted as much, for in its Memorandum to the District Court that was the only point it argued to support its contentions that the complaint stated no cause of action and that there was no genuine issue of material fact.

B. This Court should review and reverse the denial of conscientious objector status because this denial (1) unjustifiably interferes with the free exercise of his religion; and (2) wrongly discriminates against him because of his particular content of his religious convictions.

1. THE REFUSAL UNJUSTIFIABLY INTERFERES WITH PETITIONER'S FREE EXERCISE OF HIS RELIGION BY PREVENTING HIM FROM ACTING IN ACCORDANCE WITH HIS RELIGIOUSLY-BASED CONSCIENTIOUS OBJECTION TO PARTICIPATION IN THIS WAR.

a. *The religious conscience and selective opposition.*

A religiously based conscientious objection to a war is no less either religious or conscientious because it permits fighting in defense of one's country, and objects solely to what the conscience considers an aggressive and hence immoral war. Certainly, almost all religions permit their members to fight in some wars but not in others. The

Catholic doctrine of the just war is well known, and is deeply rooted in St. Augustine and St. Thomas Aquinas; various Protestant groups have recently come out for the right of selective opposition to unjust wars, see, *e.g.*, A Policy Statement of the National Council of Churches of Christ in the United States of America (Feb. 23, 1967); Moslems believe in holy wars; Jehovah's Witnesses believe in theocratic wars and in self-defense of their brethern and their Church, *Sicurella v. United States,* 348 U. S. 485 (1954); *Kretchet v. United States,* 284 F. 2d 561 (9th Cir. 1960). Even Quaker doctrine seems to approve of the use of force to maintain world peace, as can be seen from William Penn's charter for world government. See Sibley & Jacob, Conscription of Conscience: 1940-47 25 (1952). Indeed, as the expert testimony at the hearing brought out, almost every pacifist believes in the use of force for police purposes at least. As we stumblingly grope for some kind of world government, such force will be necessary for international police work. Thus, as Stanford's Dr. Robert McAfee Brown testified: "Those who have taken the more traditional pacifist position have represented a small minority numerically within Christian history." (Rec. 546).

Nor does the fact that Petitioner opposes only wars of aggression and is willing to fight in defensive wars make his choice any less a matter of conscience. As Chief Justice Hughes said in a similar position in *United States v. MacIntosh,* 283 U. S. 605, 627 (1931) (dissent):

> There is nothing new in such an attitude. Among the most eminent statesmen here and abroad have been those who condemned the action of their country in entering into wars they thought to be unjustified. Agreements for renunciation of war presuppose a preponderant public sentiment against wars of aggression." 283 U. S. at 635.

b. *Permitting selective opposition will not impugn the integrity of the governmental process.*

It has been argued that a community cannot allow its citizens to pick and choose among wars for this would allow the citizen to make the same type of political decision as his government, but outside the context of the political process. See Note, *The Conscientious Objector and the First Amendment*, 34 U. Chi. L. Rev. 79, 102 (1966). But such impugning of the established democratic process could exist only where the citizen's dissenting position is based on the same considerations at the state's. This may exist where the dissent is based solely on political grounds. The religious dissenter however, grounds his objection on factors which a secular state cannot even consider—his religious beliefs. There is thus no derogation of the political process in honoring a religiously based objection, which is really outside the secular political decision-making process.

This is not to say that there is a rigid separation between the political and the religious, an assumption which also underlies the above-stated objection to selective opposition. Such a separation has never existed and probably never will or should, for so long as religion is relevant to how men live in this world, it must be concerned with social and political problems. But this in no way detracts from the religious, non-secular source of the objection.

The complex and subtle relationship between religion and politics was clearly noted by this Court in *Seeger*. There, it recognized not only the inevitable link between religion and politics, but also the difference between a politically grounded objection and one that is religiously based. In discussing the statutory language describing those whose beliefs do not qualify them for conscientious

objector status, the Court stressed the purely secular nature of those beliefs. Thus, this Court noted that there were two classes of ineligibles: (1) "Those persons who, *disavowing religious belief*, decide on the basis of essentially political, sociological or economic considerations that war is wrong and that they will have no part of it," 380 U. S. at 173 (emphasis added), and (2) those whose objections are based on a "merely personal moral code." With respect to this latter, the Court explained that this referred to a moral code which is in no way religious *id.* at 186. Thus the exclusions apply to objections based *solely* on "political, sociological or economic considerations," or on a "moral code" which contains no religious ingredient whatsoever. On the other hand, one whose "political sociological, economic" or "moral code" objection does derive from his religious belief, is entitled to exemption, as was expressly recognized in *United States v. Fleming*, 344 F. 2d at 916.

As Chief Justice Hughes stated in *MacIntosh:*

> "There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power." 283 U. S. at 634.

This is not to say, of course, that conscience should be ignored when based on non-religious morality. It is only to say that such a situation does not raise problems posed by a religiously-oriented selective opposition, as in this case.

c. *Permitting selective opposition will not interfere with necessary governmental functions.*

It has been noted many times that the number of conscientious objectors is so small that allowing the claim will not interfere with the military objectives of the nation. See, *e.g.*, Note, 34 U. Chi. L. Rev. at 103-04. Though this was said with respect to total pacifists, permitting selective objectors would not appreciably swell the number, especially if, as the law presently stands, it is limited to those who are sincerely religious. This is in part because local boards and other tribunals are not easily persuaded of the applicant's sincerity, *cf. e.g., Dickinson, supra,* and it takes a good deal of courage to be a conscientious objector. See Sibley & Jacob 461. The *Schwimmer* theory that a pacifist's example will deter many from serving in the military by his example, has been thoroughly discredited, for in times of crisis, very few indeed are influenced by the pacifist. See *United States v. Schwimmer*, 279 U. S. 644, 659 (1929).

There are also certain practical considerations in this regard. No conscientious objector, whether selective or total, is likely to make a good soldier. Many are willing to accept alternate service, as Petitioner was and is (Complaint ¶¶ 22-23), and it seems a flagrant waste of highly trained and scarce resources to force such a person to go to jail in order not to violate his conscience. *Cf. United States v. MacIntosh*, 283 U. S. at 629. It seems especially wasteful since it is clear that in this area compulsion simply does not work—it merely puts a substantial number of people behind bars and fails either to deter or to make use of the true conscientious objector. Sibley & Jacob 475-78.

d. *The importance of respecting conscience.*

Regardless of whether there is a constitutional right to a conscientious objector exemption, there can be no doubt that the order to report for flight training for eventual participation in the Vietnam war conflicts with the dictates of Petitioner's conscience. Yet, "both morals and sound policy require that the state should not violate the conscience of the individual * * *" Stone, *The Conscientious Objector*, 21 Colum. U. Q. 253, 269 (1919) as quoted in *United States v. Seeger*, 380 U. S. at 170. In *United States v. MacIntosh*, 283 U. S. at 633 Chief Justice Hughes, joined by Justice Holmes, Brandeis and Stone wrote, "In the forum of conscience, duty to a moral power higher than the State has always been maintained."

We live today, in a world where man's destructive skills have far outdistanced his meager peace-making wisdom, where harsh voices of frustration, cruelty, and arrogant power often render the still small voice of conscience virtually mute. In such a world, we should not readily override a sincerely religious "respect and love for man, faith in his inherent goodness and perfectability," see Noyd Affidavit attached to Complaint, an attachment to an "ideal * * * [of] a community of spirits in which the latent moral potentialities of men shall have been elicited by their reciprocal endeavors to enlist the best in their fellow men," Muzzey, cited in 380 U. S. at 183. As the American poet Karl Shapiro has reminded us in his poem "The Conscientious Objector,"

"..... Your conscience
Is what we come back to in the armistice."

And where men, frightened and without faith, bewildered and frustrated, run from one false god to another and lose their small measure of tolerance, they come to resent those

who try to stand apart in the name of conscience. Just as the prophets and Jesus were reviled and persecuted in their troubled times, so is today's conscientious objector. See generally Sibley & Jacob, *supra*. At such times, it becomes all the more important that moral conscience be protected, for it is at such times that it is most endangered and yet most needed.

2. THE REFUSAL TO HONOR THE CONSCIENTIOUS OBJECTIONS OF PETITIONER'S RELIGIOUSLY BASED SELECTIVE PACIFISM DISCRIMINATES AGAINST PETITIONER'S RELIGIOUS BELIEFS.

An exemption granted to one religious belief on religious grounds cannot be denied to another. See *Sherbert v. Verner*, 374 U. S. 398, 404 (1963); *Torcaso v. Watkins*, 367 U. S. 488, 495 (1961). If one man's religious belief precludes him from participating in a war because of the nature of that *particular* war, and another's belief precludes him from such participation in that same war because of his religious views about *all* wars, to deny an exemption to the former while granting it to the latter, clearly discriminates against the former religion. Such invidious discrimination will either discourage adherence to the former religious belief or will encourage dishonesty. So long as both beliefs are religious, and so long as religion remains the basis for exemption, such differing treatment is constitutionally prohibited, see *Bolling v. Sharpe*, 347 U. S. 497 (1954), for it is hardly a reasonable classification, so long as both applicants for exemption are equally sincere and base their applications on their respective religious beliefs.

C. The issue is appropriate for determination at this time because the ambiguity of the statute and regulations has produced uncertainty and conflicting decisions which have caused and will cause serious harm.

1. THE PROBLEM IS IMPORTANT AND RECURRING.

There is currently a great deal of concern over this problem, caused largely by the frightening potential of modern warfare and by uncertainties as to our present Vietnam involvement. The problem is not new, however. It was with us in World War II, Sibley & Jacob 69, and goes back as far as Catholic and earlier notions of the just war.

2. THE STATUTE AND REGULATIONS ARE AMBIGUOUS AND THE DECISIONS ARE CONFLICTING WITH MOST HAVING BEEN WRONGLY DECIDED.

As noted, Petitioner applied under AFR 35-24, par. 2b, the key sentence of which provides that:

> "Accordingly, bona fide religious objection to participation in war, in any form, has been recognized to the extent that such an objector is not inducted into the Armed Forces but is required to serve his country for the same period of time in civilian work contributing to the maintenance of national health, safety, or interest".

This section is patterned after 50 U. S. C. § 456(j), and thus decisions under that statute are relevant to the interpretation of AFR 35-24.

A long line of cases have allowed the claim of selective opposition to war. In *Sicurella v. United States*, 348 U. S. 385 (1955) this Court held that a Jehovah's Witness, who believed in the use of force to defend his "ministry, Kingdom Interests and * * * his fellow brethren," 348 U. S. at 388, though not himself, and would fight in a war at God's request, though apparently only with spiritual weapons,

was entitled to conscientious objector status. Two Justices dissented, claiming that the defendant was being allowed to choose the wars he would fight in. In accord with this decision, the lower federal courts have granted Jehovah's Witnesses such exemptions in a long series of cases, even where the Witness was willing to slay men at Jehovah's request. See, *e.g., Kretchet v. United States,* 284 F. 2d 561 (9th Cir. 1961). Although the Court in *Sicurella* stressed that such orders had not yet come from Jehovah and were unlikely to, all these defendants appeared willing to use force in defense of their Church or their brethern, but not aggressively, just as Petitioner expressed willingness to use force in defense of his country but not aggressively.

In addition, the recent decision of *Fleming v. United States, supra,* seem to have granted an exemption to one who believed that some wars are permitted. Though he thought "love and positive forces" would usually be effective to eliminate war, he added that "force should be used only as a final alternative and under fair circumstances." 344 F. 2d at 914. Expressly adverting to defense of country, as did Petitioner, the defendant in *Fleming* stated that "self-defense of a people would not involve war—but protection against a smaller group which could not be reconciled by intelligence and positive forces." *Ibid.*

On the other hand, a few cases have held that the phrase "participation in war in any form" precludes an exemption for selective objectors. *United States v. Kauten,* 133 F. 2d 703 (2d Cir. 1943); *cf. U. S. ex rel. Phillips v. Downer,* 135 F. 2d 521, 524 (2d Cir. 1943); *United States v. Kurki,* 255 F. Supp. 161 (E. D. Wis. 1966). In *Kauten,* however, the defendant was an avowed atheist who based his opposition on philosophical grounds. The invidious discrimination and interference with religious conscience which

would result from discriminatory treatment against the religiously-motivated selective pacifist were obviously not present. Moreover, the absence of a religious basis, in and of itself, of course disqualified the applicant, under *Seeger's* interpretation of § 456(j).

The *Kurki* case and the Government rely on the claim that "in any form" modifies "war", and precludes the right to choose among wars. As a matter of literal construction, there is no reason not to read the qualification "in any form" as modifying "participation," which would grant an exemption to any man who conscientiously and religiously refuses to participate "in any form," of combatant training and service in connection with a war. It thus implies nothing about whether this must be with respect to all wars, or can be only with respect to some. This indeed, was precisely the position taken by the Eighth, Seventh and Second Circuit. See *Taffs v. United States,* 208 F. 2d 329. 331 (8th Cir. 1953), *cert. denied,* 74 Sup. Ct. 532 (1954); *United States v. Hartman,* 209 F. 2d 366, 371 (2d Cir. 1954); *United States v. Close,* 215 F. 2d 439, 442 (7th Cir. 1954).

Thus, in *Taffs,* the Court declared that

> "The words, 'in any form', obviously relate, not to 'war' but to 'participation in' war. War, generally speaking, has only one form, a clash of opposing forces. But a person's participation therein may be in a variety of forms. He may be carrying a rifle, piloting a plane, working in a clerical staff behind the lines, or working in a defense plant on the home front. We think Congress intended by this section to exempt those persons from serving in the armed forces whose religious beliefs were opposed to any form of participation in a flesh and blood war between nations."

Regardless of whether this case involved Jehovah's Witnesses and theocratic wars, the Court's interpretation of the modifying clause is appropriate to all cases.

This reading is supported by AFR 35-24 itself, which insert a comma after "participation in war" so that the sentence reads "participation in war, in any form" indicating that the modified term is "participation in war" not merely "war". And the substance of this regulation supports such a reading for it describes such an objector as one who does not serve in the military but will serve in a civilian capacity.

This is further borne out by the Selective Service Regulations defining Class 1-A-O, and Class 1-O, the former of which calls for service in a combatant capacity while the latter involves only civilian service:

> "1622.11 Class I-A-O: Conscientious Objector Available for Noncombatant Military Service Only. (a) In Class I-A-O shall be placed every registrant who should have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously imposed to combatant training and service in the armed forces."

> "1622.14 Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety, or Interest. (a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in both combatant and non-combatant training and service in the armed forces."

It should be noted that one who will enter the military in a noncombatant capacity (Class 1-A-O) is not described as one opposed to "participation", whereas the person who will have nothing to do with the military in *any* capacity is so described. If "in any form" relates to war, the phrase "participation in war in any form" would be equally applicable to both classes of conscientious objectors. But if it relates to "participation," it is only applicable to Class

1-O where the individual will not serve in any capacity, *i.e.*, will not participate in any form.

Furthermore, while "in any form" grammatically speaking, relates to participation, it is an awkward expression if intended to modify war. "All wars" or "any war" would have been a much smoother expression of that intention.

Seeger's citation to the *MacIntosh* dissent lends some further support to this reading. The *Seeger* case first cited this dissent, as "enunciat[ing] the long recognition of conscientious objection," and quoted Chief Justice Hughes' eloquent defense of the right of conscience, a *defense made on behalf of a selective objector*. Moreover, other key quotations and citations in *Seeger*, see 380 U. S. at 170, are in the same paragraph as that in which the Chief Justice Hughes declared that "Professor MacIntosh, when pressed by the inquiries put to him, stated what is axiomatic in religious doctrine." 283 U. S. at 633-34. These statements by Professor MacIntosh were a profession of selective opposition. See 283 U. S. at 617-19. Surely the adoption of the rationale of the *MacIntosh* dissent by both the *Seeger* court and by Congress, see 380 U. S. at 170, impliedly adopted its application to the very situation in which that rationale was first enunciated—selective opposition based on conscience.

For all these reasons, and because a different interpretation would raise serious constitutional questions, see *Seeger, supra,* AFR 35-24 and 50 U. S. C. § 456(j) should be interpreted as allowing an exemption to selective objections. The varying interpretations and circuits are so deeply in conflict that this Court should at least resolve the issue at this time to avoid further conflict.

II. The courts below erroneously dismissed petitioner's *habeas corpus* proceeding on the ground that he had failed to exhaust his remedies within the military service.

A. The doctrine of exhaustion of remedies is inapplicable to the circumstances of this case.

In stating the legal issue before it on the defendants' motion to dismiss, the district court said (Appendix to petition 11a):

> "The threshold question is whether this court has jurisdiction to entertain the suit and grant the relief requested. On its face it is a collateral attack on an administrative decision which is made prior to the completion of the proceedings in the department. It anticipates the refusal of the Air Force to refuse to recognize plaintiff's stand and seeks to avoid court martial proceedings and the imposition of sanctions. Thus, the initial question is whether the plaintiff has exhausted the remedies which exist within the military establishment whereby this court can entertain the action."

The Court's answer to its statement of the issue was: "We conclude we are without jurisdiction to hear the plaintiff's claim. It is a collateral attack * * * We must restrain ourselves from interfering with the military processes. Plaintiff would have us short circuit all of these proceedings so as to spare him from military justice" (*id.* at 17a-18a). The Court relied wholly on the doctrine of abstention which, it stated, "has been applied consistently to military adjudications" (*id.* at 12a). The Court of Appeals affirmed on this ground.

We submit that the exhaustion doctrine relied upon by the Courts below is not applicable to a case like the present. Where court martial proceedings have already been instituted against persons under the asserted jurisdiction of the military, the federal courts have been scrupulous to

avoid interfering until every phase of those proceedings has been availed of. All of the cases cited by the district court involved situations in which this had not been done. In *Wales v. Whitney*, the Court indicated that the petitioner should not press his attack on jurisdiction until the court martial had passed upon the claim that it lacked jurisdiction. The action which led to the petitioner's seeking relief was the service upon him of an order issued by the Secretary of the Navy placing him under arrest and directing him to appear before a court martial for trial on a stated date. In other words, a court martial proceeding had purportedly been instituted from which the petitioner was seeking collateral relief on jurisdictional grounds, although opportunities were available to present those grounds in the very proceeding which gave rise to the claim.

In *Gurik v. Schilder*, 340 U. S. 128 (1950) this Court held that, before attacking in civilian courts a court martial conviction, the petitioner was required to utilize a statutory procedure allowing a petition for a new trial by the court martial. The well settled doctrine requiring exhaustion of remedies within the court martial system was held to be applicable although the procedure authorizing a new trial had not become available until after the district court had held a hearing in the *habeas corpus* proceeding and released petitioner. The Court referred to the desirability of using the "procedure established to police the errors of the tribunal whose judgment is challenged" (p. 132). It can hardly be said that a court martial was set up to police errors made by the Secretary of the Air Force under a formal procedure in which he was vested with final authority to determine the status of claimed conscientious objectors in the service. This proposition becomes all the more clearly inapplicable in the light of the fact that under the Uniform Code of Military Justice court martial deter-

minations involving the dismissal of commissioned officer must be reviewed by the Secretary 10 U. S. C. § 871. It would be anomalous to hold that, before resort to the Courts, it was necessary to provoke a criminal proceeding culminating in review by the official whose action is challenged.

The district court also cited a series of decisions of the Court of Appeals for the Tenth Circuit applying the exhaustion doctrine.* In each one of those cases the court martial proceedings had already been instituted and *habeas corpus* was sought for relief against alleged jurisdictional errors in the court martial proceeding itself while that proceeding was still incomplete.

The inapplicability of the exhaustion doctrine to the present case is further shown by the decision of this Court in *Orloff v. Willoughby*, 345 U. S. 83 (1953). There, while the petitioner sought release from the service, an alternative form of relief requested was the granting of a commission. The issue of petitioner's right to a commission was disposed of by this Court on the merits although administrative proceedings directed to that issue were still pending. 345 U. S. at 86.

B. Under well established authority, Federal Courts have jurisdiction to adjudicate in Petitioner's present *habeas corpus* proceeding the lawfulness of the refusal of the Department of the Air Force to discharge Petitioner or to assign him to non-combatant training and service.

It has long been settled that *habeas corpus* is available to test the claim of a person inducted into the armed forces

* Gorko v. Commanding Officer, 10 Cir. 1963, 314 F. 2d 858; Spencer v. Hunter, 10 Cir. 1949, 177 F. 2d 370, *cert. denied* 344 U. S. 869; Simmons v. Hunter, 10 Cir. 1960, 179 F. 2d 664, *cert. denied* 339 U. S. 968; McMahan v. Hunter, 10 Cir. 1950, 179 F. 2d 661, *cert. denied* 339 U. S. 968; Reck v. Hunter, 10 Cir. 1950, 179 F. 2d 784; Dickens v. Hunter, 10 Cir. 1950, 179 F. 2d 784; Hunter v. Beets, 10 Cir. 1950, 180 F. 2d 101, *cert. denied* 339 U. S. 963; McKinney v. Finletter, 10 Cir. 1953, 205 F. 2d 761.

that his induction was the result of action by a local draft board beyond its jurisdiction under the Selective Training and Service Act. *Estep v. U. S.*, 327 U. S. 114, 123-4, 140 (1946). Likewise, a member of the armed forces imprisoned by action of a court martial may have the lawfulness of the court martial proceeding reviewed by federal courts in *habeas corpus* proceedings. *Burns v. Wilson*, 346 U. S. 137, 139 (1953).

In both situations, the scope of review is restricted: it is usually stated to be limited to questions involving the "jurisdiction" of the selective service board or the court martial. "Jurisdiction" in these respective contexts is held to be lost if the administrative determination in the Selective case has "no basis in fact" *Witmer v. United States*, 348 U. S. 379, 381 (1955), or if the court martial proceedings "denied [the petitioner's] basic rights guaranteed by the constitution." *Burns v. Wilson*, 346 U. S. at 139, or failed to deal "fully and fairly with an allegation raised in that application." *Id.* at 142.

While the present case does not include a claim either of detention pursuant to conviction by a court martial or of unlawful induction into service, it does involve a claim that circumstances which developed subsequent to induction have made continued retention in the sevice unlawful. *Orloff v. Willoughby*, 345 U. S. 83 (1953), is a case precisely parallel to the present one and indicates the applicability of the general principle as stated above. A doctor had been conscripted under the special provisions of the Selective Service Act authorizing the induction of doctors although they had passed the ages generally liable to induction. He petitioned for *habeas corpus*, claiming that he should either be commissioned, or discharged, or assigned to medical duty. This Court held that under the statute, he was not

required to be commissioned, but he was required to be assigned to medical service. Finding that he was so assigned, the Court dismissed the petition on the merits. The Court refused relief on the ground that it was not the function of *habeas corpus* "to determine whether specific assignments to duty fell within the basic classification of petitioner" (*id.* at 93). A comparable issue would have arisen here if the defendant Secretary had recognized petitioner's right to a conscientious objector's status, had elected to assign him to noncombatant duty, instead of discharging him, as authorized by AFR 35-24, B. 8a (2), and petitioner were seeking a review of the specific character of a particular duty assignment. But that issue, which the Court in *Orloff* declined to consider, has not arisen here.

What is significant for the present case is that in *Orloff* no question was raised about the jurisdiction of the Courts to entertain the *habeas corpus* proceeding, although like the present petitioner, the doctor was in military service and could have provoked court martial proceedings to review the legality of his duty assignment by refusing to follow it. There was no suggestion that he should have done this. Rather the Court implied that the doctor would have been entitled to release if he had not been assigned to medical duties when it said:

> "We agree that the statute should be interpreted to obligate the Army to classify specially inducted professional personnel for duty within the categories which rendered them liable to induction" (p. 88).

We submit that the Directive and Regulations establish an obligation to consider Petitioner's claim to be treated as a conscientious objector which is as fully binding upon the Air Force as the statutory direction in *Orloff* was upon the Army. This is not the case of a discretionary personnel action by the Secretary of the Air Force, as would be his re-

fusal of an ordinary request for discharge. It is a case of formal action pursuant to a duly established procedure under a mandate from the Department of Defense which prescribes not only the procedure but the governing standards. Under the relevant statutes (5 U. S. C. 171a(2)), the Secretary of Defense is vested with direction, authority, and control over the Department of Defense", within which the Department of the Air Force exists as a military department which "shall function under the authority, direction, and control of the Secretary of Defense" (5 U. S. C. § 171 (c)(7)). These circumstances authoritatively establish a criterion to which, even if it were not constitutionally required, the Secretary was legally obligated to adhere.

We submit furthermore that the failure to consider Petitioner's claim would be an unconstitutional discrimination, even if not a denial of his constitutional right to express his religion. Whether or not the recognition accorded to conscientious objectors on religious grounds by 50 U. S. C. App. 456 (j) is constitutionally required, it would be unconstitutionally discriminatory, while granting it to those inducted under the Selective Service Law, to withhold it from those who enlisted in the armed forces voluntarily. The religious conviction involved is no less entitled to recognition if acquired after entry into the armed services than if acquired before. Indeed, the present case vividly illustrates how arbitrary such a distinction would be. Petitioner was in the reserve officer's training corps while in college, and enlisted immediately upon graduation. That his religious convictions should continue to develop as his intellectual and spiritual growth continued is natural. Assuming the sincerity of those developing convictions, as we must upon the present record, the refusal to recognize them would lack any rational justification.

For these reasons, we submit that *Brown v. McNamara*, 263 F. Supp. 686 (D. N. J. 1967) and *Chavez v. Fergusson*, 266 F. Supp. 879 (N. D. Cal. 1967) are in error insofar as they hold that a member of the armed forces who voluntarily enlists has no legal basis for claiming consideration as a conscientious objector.

The *Brown* case also holds that the Federal Courts lacked jurisdiction on *habeas corpus* to determine "whether there is any basis in fact for the determination" made by the service that the claim of conscientious objection is unfounded (263 F. Supp. at 693). We submit that this conclusion is likewise erroneous.

If, as we contend, petitioner is legally entitled to a determination as to whether or not he is a conscientious objector, then the jurisdictional basis for reviewing that determination under the Selective Training and Service Act, as enunciated in *Witmer v. U. S.*, 348 U. S. 375 (1955) is likewise applicable here. Hence a jurisdictional basis exists for challenging the Secretary's determination that petitioner "did not establish that he was a conscientious objector within the meaning of AFR 35-24" (B. p. 10). If it rested upon a refusal to accept the genuineness of petitioner's belief, there was "no basis in fact for the determination" on the record in this case. *Cf. Dickinson v. United States*, 346 U. S. 389 (1953). If it rested upon the ground that Petitioner's conscientious objection was to a particular war, and not to all wars, it raises a question as to the meaning of the standard embodied in the Selective Service and Training Act and the Directive and Regulations, comparable to the issue presented in *Orloff:* the interpretation of a legal standard the application of which determines the lawfulness of a person's subjection to military service. Indeed, the necessity for judicial review is greater than it was in

Orloff since the standard here has a constitutional foundation not present in *Orloff*. As this Court made clear in *Harmon v. Brucker*, 355 U. S. 579, 481-82 (1958), the Armed Forces are not beyond the reach of the general principle that "judicial relief is available to one who has been injured by an act of a government official which is in excess of his express or implied powers".

C. Petitioner has properly invoked such jurisdiction.

Petitioner made formal application under Air Force procedures (AFR 35-24), duly established pursuant to mandatory requirements of Department of Defense Directive 1300.6, August 21, 1962, for discharge as a conscientious objector. As the Government conceded below, Headquarters, United States Air Force, processed Petitioner's application in accordance with the provisions of AFR 35-24 (Brief p. 10); an advisory opinion was obtained from the Selective Service System in accordance with that regulation; and a decision was made in the Office of the Secretary that petitioner "did not establish that he was a conscientious objector within the meaning of AFR 35-24" (Brief p. 10). This determination of the Secretary has since been reaffirmed. Petition p. 18.

In bringing his action below, Petitioner claimed, among other things, that the refusal of the Secretary to recognize him as a conscientious objector was in violation of the regulation and of the provisions of the conscientious objector provisions of the Selective Training and Service Act 50 U. S. C. App. § 456(j), which were adopted by Department of Defense Directive 1300.6, III.F. and AFR 35-24 (A2b); and that the denial was unconstitutionally arbitrary and denied petitioner's fifth amendment rights to due process of law and equal protection, and his first amendment right to the free exercise of his religion (complaint ¶ 35, 36, 37).

These contentions, we submit, were sufficient to invoke the jurisdiction of the federal courts.

Conclusion

For these reasons, *Amicus* requests that the petition for certiorari be granted, and that the decision of the court below be reversed.

Respectfully submitted,

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October 19, 1967.

INDEX

	Page
Discussion	3
1. Relationship between the civil courts and the armed forces	3
2. "Discriminating pacificism" as a basis for conscientious objector status	8
3. Absence of an adversary hearing	10
4. Air Force compliance with its procedures	10
Conclusion	11

CITATIONS

Cases:	
Dombrowski v. *Pfister*, 380 U.S. 479	7
Douglas v. *City of Jeannette*, 319 U.S. 157, 163	4
Gusik v. *Schilder*, 340 U.S. 128	4
Levy v. *Cain*, 149 F. 2d 338	5
Levy v. *Corcoran* (C.A.D.C. No. 20972, May 9, 1967), No. 576, certiorari denied, November 13, 1967	4
Orloff v. *Willoughby*, 345 U.S. 83	4, 6
Overseas Media Corp. v. *McNamara* (C.A.D.C. No. 20590, Oct. 3, 1967)	5
Reel v. *Badt*, 152 F. 2d 629	5
Reid v. *Covert*, 354 U.S. 1	5
Samuels v. *Pearson*, 151 F. 2d 801	5
Sicurella v. *United States*, 348 U.S. 385	9
Toth v. *Quarles*, 350 U.S. 11	5
United States v. *Geavey*, 368 F. 2d 144	5
United States v. *Seeger*, 380 U.S. 163	8
Wales v. *Whitney*, 114 U.S. 564	4
Young, *Ex parte*, 209 U.S. 123	7
Statute and Regulation:	
Universal Military Training and Service Act, Section 6(j), 50 U.S.C. App. 456(j)	8, 9
Air Force Regulation:	
AFR 35–24	1, 3, 7, 8
AFR 35–24, Section A, para. 2(b)	2
AFR 35–24, Section A, para. 3a	5

281-908—67

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 722

CAPTAIN DALE E. NOYD

v.

HONORABLE ROBERT S. MCNAMARA, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner has been an Air Force officer since 1955, and has been trained by the Air Force as a fighter pilot. In return for Air Force financing of several years of graduate study, he committed himself to serve until June 1969. He brought this action in the United States District Court for the District of Colorado to compel the Air Force either to accept his resignation or to assign him exclusively to non-combat duties, on the ground that he has developed conscientious objection to American participation in the Vietnam conflict. Petitioner applied through Air Force channels for separation from the service under Air Force Regulation AFR 35–24, which provides that the Air Force will, "to the extent practicable and equitable," recognize "bona fide religious objection to participation in

war, in any form" on the part of a member of the Air Force, AFR 35-24, Section A, para. 2(b). His application stated that he would "support the use of force by a nation, or preferably the community of nations, in the defense of a nation whose integrity and existence is threatened by an external aggressor—and when all peaceful attempts at conflict resolution have proved futile" (Pet. App. 9a, n. 6). Petitioner declared, however, that the war in Vietnam is "unjust and immoral" and that he could not participate in the war or contribute to it. *Ibid.* The application under this regulation was rejected by the Secretary of the Air Force. Shortly thereafter, petitioner received orders assigning him to the 27th Tactical Figher Wing, Cannon Air Force Base, New Mexico, for training in F-100 jet fighter aircraft. As the district court noted, "[t]his aircraft is currently being used in Vietnam, and the probability is strong that anyone receiving training at Cannon can anticipate transfer to the zone." 267 Supp. at 705 (Pet. App. 10a).

The district court stayed petitioner's assignment to combat training or to duties that might conflict with his conscience pending a full hearing (Pet. App. 1a–3a), but after receiving petitioner's evidence on the merits, the court dismissed the complaint on the ground that, since petitioner had voluntarily subjected himself to the military establishment and had for eleven years availed himself of its benefits, he was required to pursue the military processes, including possible court-martial proceedings, before presenting his claims to the civil courts. 267 F. Supp. 701 (Pet. App. 4a–18a). The court of appeals affirmed for the

same reason. 378 F. 2d 538 (Pet. App. 19a–22a). On June 5, 1967, Mr. Justice White, after consultation with the Court, denied petitioner's application for a stay of mandate.

The subsequent occurrences, while not a part of the record, have been accurately summarized by petitioner (Pet., pp. 16–19). Petitioner filed another application for separation under AFR 35–24; this was denied by the Secretary of the Air Force although it had received a favorable recommendation from petitioner's commanding officer at Cannon AFB. Thereafter, petitioner was ordered to take training as an instructor pilot at Cannon, where he is presently undergoing this training. We are advised that it will be completed some time between November 15 and November 30, 1967. Although no decision has yet been made as to what orders petitioner will receive, if he successfully completes the course and is assigned as an instructor pilot, his new duties would begin within a few days after completion of his training.

DISCUSSION

1. *Relationship between the civil courts and the armed forces.* The comprehensive issue posed by the questions petitioner raises (Pet. 3–4) is whether a military officer is entitled to resort to the civil courts for extraordinary relief while there still remain appropriate channels for presenting his claims within the armed services. Petitioner invokes the power of an equity court to compel the military authorities to alter their assessment of his status within the Air Force and to assign him to duties compatible with his opposition

to military operations in Vietnam. It seems clear, however, that if and when petitioner is actually confronted with an order and charged with disobedience of it, he will have the opportunity to present his defenses within the traditional framework of court-martial procedures, review boards, resort to the service Secretary, and request for relief from the Court of Military Appeals. If his contentions fail, and if they relate to fundamental rights, it would then be appropriate to test them in the civil courts by petition for habeas corpus. Only at that point, we submit, does the role of the civil courts come into play. Intervention by injunctive relief at the present stage would be unprecedented and would embroil the federal judiciary in the military processes in circumstances where there is no indication that the military channels will fail to provide fair consideration of the claims. See *Levy* v. *Corcoran* (C.A.D.C. No. 20972, May 9, 1967) (opinion of Leventhal, J.), No. 576, certiorari denied, November 13, 1967.

The courts have invariably refused to interfere in the internal affairs of the military by issuance of mandates intended merely to obviate exposure to court-martial or to anticipate the results of a court-martial. *Wales* v. *Whitney,* 114 U.S. 564; *Gusik* v. *Schilder,* 340 U.S. 128. *Cf. Orloff* v. *Willoughby,* 345 U.S. 83, 94–95.[1] This precept is especially appropriate in a situation involving the assignment of a career

[1] Even when there is no question of interference with military jurisdiction, it is a "familiar rule that courts of equity do not ordinarily restrain criminal prosecutions." *Douglas* v. *City of Jeannette,* 319 U.S. 157, 163.

military officer to combat-related duty for which he has been trained. To permit judicial review of such an assignment would strike at the core of military discipline and order.[2] Petitioner's reliance on cases such as *Toth* v. *Quarles*, 350 U.S. 11, and *Reid* v. *Covert*, 354 U.S. 1, is misplaced, since they involved persons who, unlike petitioner, were not in the service and contested the underlying jurisdiction of the military to apply military law to them. By the same token, cases which permit a Selective Service registrant to submit to induction and immediately file a petition for habeas corpus to test the legality of the induction, without risking criminal punishment (*Reel v. Badt*, 152 F. 2d 627 (C.A. 2); *Samuels* v. *Pearson*, 151 F. 2d 801 (C.A. 3); *Levy* v. *Cain*, 149 F. 2d 338 (C.A. 2)) are far removed from the situation of a man who lawfully accepted an Air Force commission twelve years ago and now seeks to contest his assignment to duty.

The fact that the Air Force applies the same substantive tests in determining the claim of a person already in the military service that he is a conscientious objector as the Selective Service System applies to a civilian registrant[3] hardly suggests that similar

[2] In *Overseas Media Corp.* v. *McNamara* (C.A.D.C. No. 20590, Oct. 3, 1967), cited by petitioner for the proposition that constitutional limits apply even to the war power, the court of appeals nevertheless recognized that the "power of the armed services to make their dispositions of men and materiel * * * does not admit of fragmentation" (slip op. p. 10).

[3] See AFR 35-24, Section A, para. 3a (Pet. App. 24a); *United States* v. *Gearey*, 368 F. 2d 144, 149-50, notes 10-11 (C.A. 2).

provisions for judicial review must be available. Compelling practical considerations demonstrate the propriety of precluding immediate civil litigation. Once a man has volunteered for pilot training, as did petitioner, the Air Force should be able to consider him immediately available for assignment to combat-related duty, without any necessity to litigate in the federal courts. Although this Court in *Orloff* v. *Willoughby*, 345 U.S. 83, did not discuss the exhaustion-of-remedies question in that case, its holding that the civil courts have no jurisdiction to revise the duty orders of a man lawfully in the service takes account of the factors that are pertinent here:

> Nothing appears to convince us that he is held in the Army unlawfully, and, that being the case, we cannot go into the discriminatory character of his orders. * * * The effect of entertaining a proceeding for judicial discharge from the Army is shown from this case. Orloff was ordered sent to the Far East Command, where the United States is now engaged in combat. By reason of these proceedings, he has remained in the United States and successfully avoided foreign service until his period of induction is almost past. Presumably, some doctor willing to tell whether he was a member of the Communist Party has been required to go to the Far East in his place. It is not difficult to see that the exercise of such jurisdiction as is here urged would be a disruptive force as to affairs peculiarly within the jurisdiction of the military authorities. [345 U.S. at 94–95.]

The consequences of judicial interference with the assignment of trained military personnel obviously

distinguishes the instant case from cases where courts have undertaken to review the legality of a Selective Service classification either before or immediately after induction.

Petitioner relies heavily on *Dombrowski* v. *Pfister*, 380 U.S. 479, but that decision in no way advances his attempt to bypass the court-martial procedure. *Dombrowski* rests on the proposition that in certain narrowly defined circumstances the federal courts have power to enjoin State prosecutions. See *Ex parte Young*, 209 U.S. 123. Wholly discrete problems are presented by petitioner's endeavor to secure the intervention of the federal judiciary in controlling his military assignment. *Dombrowski*, moreover, involved an overly broad and vague statute regulating free expression. 380 U.S. at 490–94. As this Court pointed out, if the federal courts did not intervene a series of State criminal prosecutions would have been required in order to delineate the legitimate scope of the statute on a case-by-case basis, and the uncertainties inherent in this process would have had a "chilling effect" on activity to which the statute could not constitutionally be applied. 380 U.S. at 487, 490–91. There is no analogy here: the applicability of AFR 35–24 to a person who objects to a particular war (rather than to war in any form), together with any attendant constitutional issues, can readily be decided in a single court-martial proceeding, without the continuing uncertainty that distinguished *Dombrowski*.[*]

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[*] Whether or not the court of appeals was correct in assuming that a court-martial would deem the Air Force's refusal

2. *"Discriminating pacificism"*[5] *as a basis for conscientious objector status.* In light of our contention that petitioner's suit is premature, we think it unnecessary for the Court to proceed further in order to dispose of the case. In addition, however, we suggest that none of the grounds for petitioner's prayer for injunctive relief would entitle him to prevail on the merits. His fundamental position is that the Air Force is not permitted, under AFR 35-24,[6] to distinguish between servicemen who object to participation in war in any form and those who disagree with a particular war. Such a distinction simply reflects the fundamental proposition that it is the responsibility of the President and Congress, rather than the individual soldier, to decide whether the nation should engage in a particular war. Contrary to petitioner's suggestion, this does not involve the slightest inconsistency with *United States* v. *Seeger*, 380 U.S.

(if improper) to permit petitioner to resign a justification for his refusal to obey an order is not crucial. The judgment of the court-martial would, of course, be subject to review, including the possibility of review in the civilian courts by habeas corpus. At all events, the result reached by the court of appeals in the instant case is clearly correct in view of the plain lack of merit of petitioner's case on the merits (see points 2-4, below).

[5] The term signifies that the individual is willing to participate in any particular war only after he personally appraises its "total character," his estimates of its causes, objects, geography, and the nations which are parties to it (Pet. 30).

[6] This regulation (Pet. App. 23a-27a) is the basic guide for determining who may be classified as a conscientious objector after becoming a member of the Air Force. Section 6(j) of the Universal Military Training and Service Act, 50 U.S.C. App. 456(j) (Pet. 5-7), deals specifically only with pre-induction conscientious objector claims.

163, involved the requirement that conscientious objection must be based on "belief in a relation to a Supreme Being." 50 U.S.C. App. 456(j). No question is raised here as to petitioner's belief in a Supreme Being; rather, the issue is whether that belief has led him to object to participation in war, in any form.

Nor is there any conflict with *Sicurella* v. *United States,* 348 U.S. 385, and similar cases cited by petitioner (Pet. 32, n. 22). Readiness to fight in "theocratic wars" commanded by Jehovah, to fight at Armageddon, or to use violence in self-defense and in defense of their homes, family, and associates, it was held, did not disqualify Jehovah's Witnesses from obtaining conscientious objector status. That conclusion is based on the fact "that Congress had in mind real shooting wars when it referred to participation in war in any form—actual military conflicts between nations of the earth in our time—wars with bombs and bullets, tanks, planes and rockets." *Sicurella* v. *United States,* 348 U.S. 385, 391.[7] Petitioner, unlike the

[7] This Court in *Sicurella* further commented (348 U.S. at 389–91):

> [P]etitioner emphasized that the weapons of his warfare were spiritual, nor carnal. * * * With reference to the defense of his ministry, his brethren and Kingdom interests, he asserted that "we do not arm ourselves or carry carnal weapons * * *. I do not use weapons of warfare in defense * * * of Kingdom interests * * *." [T]hese statements make it clear that petitioner's defense of "Kingdom Interests" has neither the bark nor the bite of war as we unfortunately know it today. * * *
>
> * * * Granting that * * * Jehovah's Witnesses [are] antipacifists, extolling the ancient wars of the Israelites and ready to engage in a "theocratic war" if Jehovah so commands them, and granting that the Jehovah's Witnesses

Jehovah's Witnesses, does insist that he has the right individually to judge the merits of this country's participation in particular "actual military conflicts between nations of the earth in our time." Neither Congress nor the Executive nor this Court has recognized this view as entitling its holder to conscientious objector status, and the Constitution does not require that this form of pacifism be accorded such status.

3. *Absence of an adversary hearing.* Petitioner's contention that the lack of an adversary hearing at the administrative level denied him due process is without merit. There were no contested issues of fact in this case—only the legal question of status. The Air Force's denial of petitioner's claim to conscientious objector status was based on his own statements regarding the types of war to which he objects, and there is no indication that the Air Force relied on any other evidence. In the circumstances, an adversary hearing was neither required nor appropriate.

4. *Air Force compliance with its procedures.* Nor

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will fight at Armageddon, we do not feel this is enough. The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war. As to theocratic war, petitioner's willingness to fight on the orders of Jehovah is tempered by the fact that, so far as we know, their history records no such command since Biblical times and their theology does not appear to contemplate one in the future. And although the Jehovah's Witnesses may fight in the Armageddon, we are not able to stretch our imagination to the point of believing that the yardstick of the Congress includes within its measure such spiritual wars between the powers of good and evil where the Jehovah's Witnesses, if they participate, will do so without carnal weapons.

is there any substance to petitioner's argument that the Air Force failed to comply with its own regulations, because the forwarding indorsement of his commander did not state the reason for the commander's recommendation that petitioner's application be disapproved. In the circumstances of this case, the reasoning behind the commander's statement that petitioner's application "does not meet the requirements of AFR 35–24" (Pet. 40) is obvious. Petitioner himself recognizes that it is readily apparent why the Air Force denied his applications (Pet. 27–28). Accordingly, no purpose would be served by requiring a further statement of reasons, and this issue certainly does not warrant review by this Court. Moreover, any defect in the commander's statement of reasons has been cured by the subsequent proceedings in connection with petitioner's last application. As petitioner points out (Pet. 17–18), his new commanding officer forwarded this application with a favorable recommendation accompanied by a detailed statement of his reasons.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1967.

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 722

CAPTAIN DALE E. NOYD, FR28084,

Petitioner,

—v.—

HONORABLE ROBERT S. MCNAMARA, Secretary of Defense; HONORABLE HAROLD W. BROWN, Secretary of the Air Force; GENERAL JOHN P. MCCONNELL, Chief of Staff, United States Air Force; LIEUTENANT GENERAL THOMAS S. MOORMAN, Superintendent, United States Air Force Academy; MAJOR GENERAL G. B. GREENE, JR., Assistant Deputy Chief of Staff/Personnel for Military Personnel, United States Air Force; LIEUTENANT GENERAL LEWIS B. HERSHEY, National Director, Selective Service System; COLONEL JOHN E. HORNE, Deputy Chief of Staff, Personnel, United States Air Force Academy; COLONEL HENRY E. WOJDYLA, Head, Department of Psychology and Leadership, United States Air Force Academy; BRIGADIER GENERAL ROBERT MCDERMOTT, Dean of Faculty, United States Air Force Academy,

Respondents.

SUPPLEMENTARY BRIEF FOR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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SUPPLEMENTARY BRIEF FOR PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

On November 24, 1967, subsequent to the filing of the petition for certiorari in this case, the U. S. Court of Appeals for the Third Circuit handed down its decision in *Brown* v. *McNamara*, No. 16454, which is in direct conflict

with the decision of the Tenth Circuit in the case at bar.[1] There is, therefore, an additional compelling reason for granting the petition for certiorari.

In *Brown* v. *McNamara*, the appellant, an enlisted member of the United States Army, applied for discharge as a conscientious objector under the relevant Army regulations. Upon final denial of the application, Brown filed a petition for a writ of habeas corpus in the U. S. District Court seeking review of the denial. The District Court dismissed the writ on the ground that it was without jurisdiction to review the administrative action of the Army. On appeal, the Third Circuit expressly disagreed with the District Court's conclusion. Judge Van Dusen, writing for the majority,[2] held that the federal courts had jurisdiction to review the action of the Army. He said:

> "We do not decide, however, that as a general proposition the Federal Courts lack jurisdiction to review the substantive elements of this military procedure for discharging conscientious objectors. More specifically, we do not hold that a Federal Court has no jurisdiction, no matter how arbitrary military action might be, to grant habeas corpus relief to an enlisted member of the Armed Forces who applies for discharge as a conscientious objector after commencing his ac-

[1] The opinion of the Third Circuit in *Brown* v. *McNamara* is set out in the appendix, *infra*.

[2] The majority on the question of jurisdiction consisted of Judge Van Dusen and Judge Maris dissenting. The majority which affirmed the decision below was based upon the combined decision of Judge Van Dusen who held that the Army had not acted unreasonably in this case, and the concurring opinion of Judge Staley that the federal courts had no jurisdiction to review the action.

> tive service. With this view of our jurisdiction, we reject the appellant's petition on the basis of our examination of this particular record."

Thus the Third Circuit, while rejecting petitioner's appeal, did so *on the merits* after expressly acknowledging its jurisdiction to review the procedural and substantive bases of military disposition of applications for discharge as a conscientious objector.[3]

The Tenth Circuit holding in the case at bar is in flat contradiction to the opinion in *Brown* v. *McNamara,* for it explicitly adopted as its own the language of the District Court's opinion which said:

> "... We are without jurisdiction to hear the plaintiff's claim. It is a collateral attack regardless of whether it is considered in the framework of habeas corpus, injunction, or declaratory judgment, and the result is always the same. We must restrain ourselves from interfering with the military processes." 267 F. Supp. 701, 708.

The Tenth Circuit not only refused to consider the factual adequacy of the substantive determination in Noyd's application for conscientious objector status by the Air Force, it also refused to consider the procedural due process claims arising out of the Air Force Regulations for determining conscientious objector status. The Third Circuit, in contrast, made both these inquiries. The importance of the resolution of this conflict between the Third Circuit and Tenth Circuits is therefore manifest.

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[3] The Third Circuit, unlike the Tenth Circuit, also reviewed appellant's claims concerning procedural due process defects.

Petitioner directs the Court's attention to the similarity of the language used in the trial court's opinion in *Noyd* v. *McNamara, supra,* adopted as the Tenth Circuit's opinion, and the statement of the District Court in *Brown* v. *McNamara,* that to review the factual basis of claims for discharge as a conscientious objector, ". . . could seriously disrupt the internal operation of the military," 263 F. Supp. 692, and that "Even this narrow scope of review could result in the disruption of military operations." 263 F. Supp. 693. This position is disavowed by the jurisdictional position taken by the Third Circuit. The *Noyd* v. *McNamara* trial court, citing the District Court opinion in *Brown* v. *McNamara* as its authority for its position on exhaustion of remedies, wrote:

> "If courts were allowed to entertain these suits at any stage of the military proceedings, the delays incident to litigation could of themselves render military orders ineffectual." 267 F. Supp. at 707.

The Court of Appeals for the Third Circuit, fully aware of the stated apprehension by two District Courts and one Court of Appeals that civil litigation of the kind involved both in *Brown* and *Noyd* would disrupt the mission of the armed forces, nonetheless concluded that it could protect a soldier's constitutional rights without threatening military effectiveness. That the Third Circuit rejected the limitations adopted by three separate courts reflects the depth of the conflict now before this Court.

CONCLUSION

For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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Dated: November 28, 1967

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 16454

DAVID W. BROWN, PRIVATE E-2 RA 11 797 464,
Appellant,

v.

HON. ROBERT S. McNAMARA, SECRETARY OF DEFENSE;
HON. STANLEY R. RESOR, SECRETARY OF THE ARMY;
MAJOR GENERAL JOHN M. HIGHTOWER,
COMMANDING GENERAL, U. S. ARMY TRAINING CENTER,
INFANTRY, U. S. ARMY, FORT DIX, NEW JERSEY,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued October 5, 1967

Before STALEY, *Chief Judge,* and MARIS and VAN DUSEN,
Circuit Judges

OPINION OF THE COURT

(Filed November 24, 1967)

By VAN DUSEN, *Circuit Judge*

This appeal concerns the jurisdiction of the Federal Courts over persons in the military service.[1] The case is before the court on appeal from an order of the District Court denying a petition for a writ of habeas corpus, requesting the discharge of appellant from the Army on the grounds of his being a conscientious objector. Appellant

1 The background of this case is set out in considerable detail in the able opinion of Judge Lane: *Brown v. McNamara,* 268 F. Supp. 686 (D. N. J. 1967).

(Private David W. Brown) voluntarily enlisted in the Army. The petition alleges that his religious beliefs "crystalized" two weeks after beginning his basic training at Fort Dix, New Jersey, and he refused to proceed further with combat training.

Army Regulations (AR 635-20) provided a procedure for people in Private Brown's position to request discharge from the Army on the grounds of conscientious objection. Private Brown submitted the required forms, together with the required documentation, and complied fully with the procedure, including the Chaplain's and psychiatrist's reports. This internal Army regulation was adopted pursuant to a Defense Department directive designed to establish uniform procedures in all branches of the Armed Services for considering discharge requests on the grounds of conscientious objection (DOD No. 1300.6). The administrative system contemplated by the Defense Department and enacted by the Army regulation is fairly detailed. But in general terms it provides for a "discretionary" discharge, consistent with the national policy of not inducting conscientious objectors. Since members of the Armed Forces are involved, however, such discharge requests will be recognized only "to the extent practicable and equitable." Certain guidelines and rules are given for exercising this discretion, including: the claimed objection cannot stem from beliefs existing before entering the Armed Forces; each service's headquarters will decide, after consideration of the peculiar circumstances of the case; great care should be used to insure the sincerity of the claim; the same standards used by the Selective Service System for pre-induction claims should be used (an advisory I-O classification from the Selective Service will be a normal prerequisite for discharge, particularly where the applicant has less than two years of service); and no absolute objective measurements can be applied across the board. The procedure suggested allows for assignment to non-combatant duties in certain cases and the Army regulations provide

for assignment to duties providing the minimum conflict with professed religious beliefs pending final decision on an application for discharge.

Private Brown's application did not receive a favorable advisory classification of I-O (or I-A-O allowing a non-combatant assignment) from the Director of Selective Service, despite several letters submitted on his behalf from outside sources attesting to his religious convictions. Both the Chaplain's report and the Commanding Officer's recommendation of disapproval made reference to Brown's contact with pacifist organizations and persons, and both concluded that his beliefs were based upon these contacts, as opposed to religious convictions. Based on this recommendation, the documents attached to the application, and the Selective Service opinion, the Adjutant General denied discharge and, accordingly, Private Brown was ordered to draw combat training equipment. Brown refused. After hearing by a Special Court Martial and suspension of his sentence by the reviewing officer, a second refusal to obey orders led to new charges. Instead of convening a second court martial, suspension of the original sentence of three months' confinement at hard labor was vacated and Brown was ordered into confinement.[2] The petition for a writ of habeas corpus followed, alleging that Brown was being held in violation of his rights. In general terms, appellant alleged that the Army violated its own procedure, made an incorrect determination of Brown's conscientious objector status, and followed an administrative procedure that denied Brown constitutionally required procedural and substantive due process, as well as equal protection of law.

The lower court denied any relief by way of habeas corpus, finding no constitutional infirmity in the adminis-

2 At oral argument, counsel for appellant indicated that Private Brown again refused to obey orders after his three-month sentence and thus incurred another court-martial sentence, 18 months at hard labor, to be served at Fort Leavenworth, Kansas. No good reason has been shown why transfer of petitioner-appellant Brown from Fort Dix should be restrained, as orally requested by his counsel at argument. It is noted that no written motion for such extra relief has been presented.

trative procedure used by the Army and no jurisdiction to review their factual determination under that procedure. We agree with the excellent opinion of Judge Lane on the issue of procedural due process.[3] Regardless of the constitutional underpinnings of the right to classification as a conscientious objector, it is perfectly rational and consonant with constitutional concerns, including the separation of powers, to regard voluntarily enlisted servicemen as a distinct class from inducted civilians or servicemen in general discharged to civilian life. We therefore affirm the conclusion "that the administrative scheme set up by the Department of Defense and the Army does not of itself result in any constitutional violation." See *Brown v. McNamara, supra,* at 691.

Inherent in this conclusion and our approval is a decision that the Federal Courts have jurisdiction to make this review of procedural due process just as they would if the question were one of statutory construction. E. g., *Harmon v. Brucker,* 355 U. S. 579, 581-2 (1958).

We do not decide, however, that as a general proposition the Federal Courts lack jurisdiction to review the substantive elements of this military procedure for discharging conscientious objectors. More specifically, we do not hold that a Federal Court has no jurisdiction, no matter how arbitrary military action might be, to grant habeas corpus relief to an enlisted member of the Armed Forces who applies for discharge as a conscientious objector after commencing his active service. With this view of our jurisdiction, we reject the appellant's petition on the basis of our examination of this particular record.[4]

Whether or not our review of the question of substantive due process which may be presented in any case of a

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3 *Brown v. McNamara, supra.* We use the dichotomy of "procedural" and "substantive" due process in this case only to help emphasize what we do and do not decide on this appeal. We realize fully that the distinction is not always a clear line and may well break down under certain circumstances.

4 Such concerns as interference with the military are not irrelevant or necessarily of slight importance. See Warren, *The Bill of Rights and the Military,* 37 N. Y. U. L. Rev. 181, 197 (1962).

person voluntarily enlisted in military service is as broad as or limited to the "basis in fact test," *Estep v. United States*, 327 U. S. 114, 122-23 (1946); *United States v. Seeger*, 380 U. S. 163, 185 (1965), or whether an indispensable prerequisite to our exercise of jurisdiction is always the complete exhaustion of military remedies, *Gusik v. Schilder*, 340 U. S. 128 (1950),[5] we need not decide in this case.

The present record contains sufficient evidence to show that the Adjutant General's denial of discharge for reasons of conscientious objection was not arbitrary, or capricious, or irrational.[6] We draw specific attention to the advisory opinion of the Director of Selective Service, to the full compliance of the Army with AR 635-20, to the requirements in DOD 1300.6 that claims will be recognized "to the extent practicable and equitable" and that claims will not be entertained if the conscientious objector's beliefs existed prior to entering the Armed Forces, to the fact that Private Brown made his claim two weeks after beginning basic training (six weeks after enlisting), to the statement of the Brigade Chaplain that "I am of the opinion that his beliefs, though sincere, are based on contacts he has had with Paci-

5 See also, *Beard v. Stahr*, 370 U. S. 41 (1962). Claimed "conscientious objector" status can always be raised as a defense to prosecution for refusing to obey orders. From any judgment or sentence, comprehensive appeal is available. 10 U. S. C. §§ 817, 859-876. This includes resort to a board of review (10 U. S. C. § 866), to the Court of Military Appeals (10 U. S. C. § 867), to the Secretary of the Army (10 U. S. C. § 874), and petition for a new trial (10 U. S. C. § 873). Appellant has not pursued all these available remedies. On this record, we are unwilling to expand the principle of *Dombrowski v. Pfister*, 380 U. S. 479 (1965), in order to assure for appellant determination of any constitutional issues without exposure to court martial proceedings. See *Noyd v. McNamara*, 378 F. 2d 538, 540 (10th Cir. 1967). Counsel for appellant have referred us to the case of *United States v. Taylor*, No. CM413709 (Board of Review, U. S. Army, October 24, 1966), where conscientious objection was deemed no defense to a refusal to obey orders and thus evidence on the determination of a claim as a conscientious objector was held properly excluded. We do not have the record in this case and note that this case is not a determination by the highest Army appellate authority.

6 See *Burns v. Wilson*, 346 U. S. 137, 142-3 (1953), where the court noted in an analogous situation:

> "For the constitutional guarantee of due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness rather than finding truth through adherence to those basic guarantees which have long been recognized and honored by the military courts as well as the civil courts."

fistic Organizations and individuals rather than on Religious Convictions," and to the opinion of the Commanding Officer that Private Brown's beliefs were "mainly based on readings and influences made upon him by persons practicing pacifist policies, not on religious beliefs."[7]

Such factors constitute a sufficient basis for the Army's decision within the guidelines of DOD 1300.6. In this posture, Private Brown's petition presents no claim sufficiently unique, nor does his position show such injustice, that we are compelled to interfere in whatever internal avenues of appeal are available to him within the Army.

For these reasons, the petitioner is not now entitled to a writ of habeas corpus and we will affirm the decision of the court below.

STALEY, *Chief Judge,* Concurring.

I concur in the affirmance of the district court's denial of the writ. I also agree with the majority opinion insofar as it affirms the finding of the district court that the administrative procedure used by the Army did not deny the appellant procedural due process. However, I agree with the district court's conclusion that federal courts should refuse to accept subject matter jurisdiction to pass on the

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7 It is noted that in his application for discharge, appellant included under "Pacifist Training": personal contact with professed pacifists, reading of literature from SANE and the World Federalists, contacts with peace groups at Yale, including "Alternative" and "Americans for Reappraisal of Far Eastern Policy," and reading the beginning of MacLuham, *Understanding Media: The Extension of Man.* Although, as stated above, we do not here decide the applicability of the "basis in fact" test to classification of enlistees after entering active service, this case does fulfil the requirements under the test suggested in *Dickinson v. United States,* 346 U. S. 389, 396 (1953), there being a showing that the Army's finding was supported by "some affirmative evidence," and the requirements suggested in *United States v. Seeger, supra,* at 179-80, since the record contains affirmative evidence that the appellant's opposition to military service was not "based on grounds that can fairly be said to be 'religious.'"

It is also noted that the Commanding Officer believed that "prior to his enlistment into military service, and since . . . [that time] Brown has been subjected to reading numerous papers and pamphlets concerning the 'Pacifist Program' currently being demonstrated in this country." As pointed out above, conscientious objector beliefs existing prior to entry into the Armed Forces are not grounds for discharge under AR 635-20.

factual adequacy of the Army's decision. 263 F.Supp. at 692-93. As stated in the opinion below, the exercise of such jurisdiction has properly been held to be unduly disruptive of the operation of the armed forces, and contrary to the doctrine of the separation of powers. Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953); Harmon v. Brucker, 243 F.2d 613, 619 (C.A.D.C., 1957) rev'd other grounds, 355 U.S. 579 (1958).

MARIS, *Circuit Judge,* concurring in part and dissenting in part.

I concur with the opinion of the court in holding that the federal courts have power to review the substantive elements of the military proceedings under which Brown was denied discharge from the Army as a conscientious objector. But I cannot agree that upon such review the denial of his discharge must be upheld. For I think that the military authorities made a basic error in concluding that the fact that Brown's pacifist beliefs were based on contacts with or influences made upon him by pacifist persons and organizations was evidence that they were necessarily not religious beliefs. Quite the contrary may very well have been the case. For it can hardly be denied that the pacifist position of opposition to war stems from the Divine commands not to kill but to love one's enemies and that through the centuries most of those who have taken the pacifist position have done so on the basis of their religious beliefs. Indeed recognition of this fact is the basis of the exemption from military service and training which is granted by the Selective Service Act to conscientious objectors. As to the broad meaning of religious belief in this connection see United States v. Seeger, 1965, 380 U.S. 163.

It is true, of course, that there are pacifists who are motivated solely by political, sociological or philosophical views. But it is quite erroneous to assume, as the military

authorities did in Brown's case, that pacifist persons are necessarily not religiously motivated and that organizations supporting the pacifist position are necessarily organized and led by persons whose pacifist views stem from other than religious conviction, and to conclude from that assumption that the contacts with Brown and influences upon him by such persons and organizations did not involve religious grounds of opposition to war. On the contrary I believe it to be a fact that in this country most pacifists are religiously motivated, as the Seeger case defines such motivation, and that most organizations supporting the pacifist position are largely composed of and led by individuals so motivated. The military authorities had before them no evidence as to the actual basis of the pacifist beliefs of the persons and organizations with which Brown was in contact or as to the nature of the views which they expressed to him. Since their erroneous assumption that these must necessarily have been non-religious infects the whole record and obviously influenced their decision, I would reverse.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.